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91-1831

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.* and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the First Amendment to the United States Constitution violated by the State University of New York compelling students to pay a mandatory student activity fee to support a group which engages in significant political and ideological speech and activities with which some students disagree?

2. Is the First Amendment violation resulting from compelling students to pay student activity fees which are used to finance the political and ideological speech of others cured by limiting the use of those fees to finance political and ideological speech on campus?

PARTIES TO THE PROCEEDING

The Petitioners, Appellants below, are: Thomas W. Carroll, Robert J. Carroll, Michael E. McChesney, Emanuel J. Panos, Edward J. Priola, Craig J. Rucker, Robert T. Schmidlin, Beth Turkovic Garfunkel, Christine McClellan, Christopher Sandor and Susanne Ziegler.

The Respondents, Appellees below, are Donald M. Blinken, in his capacity as Chairman of the Board of Trustees of the State University of New York, George L. Collins, Jr., D. Clinton Dominick, Judith Lasker Duken, Arnold B. Gardner, Gurstin D. Goldin, John L.S. Holloman, Jr., Nan Johnson, Everette Joseph, Judith Davidson Moyers, Edward V. Mele, Victor Marrero, Rosemary Salomone, Edgar A. Sandman, Thomas van Arsdale, Darwin R. Wales, in their capacities as Trustees of the State University of New York, Jerome Komisar, in his capacity as Acting Chancellor of the State University of New York, Vincent O'Leary, Clifford D. Clark, Alice Chandler, in his or her capacity as president and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, and the New York Public Interest Research Group, Inc.[1]

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[1] All of the respondents, except the New York Public Interest Research Group, Inc., were sued in their official capacity. During the course of this case, many of them ceased holding the official positions they held when sued. Pursuant to Fed.R.Civ.P. 25(d), their successors were deemed to have been automatically substituted as defendants.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported at 957 F.2d 991 (2d Cir. 1992) The decision is reproduced in Appendix A. Page references are to the Appendix. The decision of the United States District Court for the Southern District of New York is reported at 768 F.Supp. 1030 (S.D.N.Y. 1991).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, review of which is sought in this petition, was entered February 13, 1992, and was filed the same day. No petition for rehearing was filed. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The full text of these constitutional provisions is set out at Appendix B. Also at issue is the student activity fee regulation of the State University of New York, contained in volume 8 of the New York Consolidated Rules and Regulations ("N.Y.C.R.R."), §302.14, the full text of which is set out at Appendix C.

STATEMENT OF THE CASE

This is an action by eleven former and current students[2] (hereafter "the students") at three campuses of the State University of New York (hereafter "SUNY") against officials of the university and against the New York Public Interest Research Group, Inc. (hereafter "NYPIRG") to halt the use of the mandatory and non-refundable student activity fee, required to be paid each semester by each undergraduate student at the SUNY campus at Albany, to finance NYPIRG, a private entity, with whose political and ideological advocacy activities they disagree.[3] The claims for a permanent injunction, declaratory judgment and damages were brought pursuant to 42 U.S.C. §§ 1983 and 1985(3), 29 U.S.C. §§ 2201 and 2202, and the First and Fourteenth Amendments to the Constitution.

The students alleged that the payment of a portion of the mandatory student activity fee to NYPIRG violates their constitutionally protected rights of speech and association because NYPIRG is an organization which engages in political activity and political speech with which they do not agree and do not wish to be associated.

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[2] During the course of the litigation a number of student plaintiffs discontinued their participation, and a number of matriculating students were added, so that at all times the plaintiffs included at least one current student.

[3] The original complaint, and subsequent supplemental and amended complaints filed in the action, sought a permanent injunction, declaratory judgment, and damages equal to the amount of each plaintiff's mandatory student activity fee payments paid over to NYPIRG during the student's years at SUNY. Prior to trial, the district court bifurcated the issues, and determined that it would try only the issue of injunctive relief. Because the only plaintiffs who were current students at that time were attending only one school, the SUNY campus at Albany, the trial was limited to facts relating to that campus. The facts as to the other campuses are not substantively dissimilar.

All SUNY Albany students are required by a regulation, 8 N.Y.C.R.R. § 302.14 (hereafter the "Regulation"), adopted pursuant to section 355 of the New York Education Law, to pay a non-refundable student activities fee each semester. The amount of the fee is fixed by the Student Association, with an upper limit, $125.00 per year in 1989, set by SUNY. Those who fail to pay the fee are not permitted to register. The regulation provides that students at each SUNY campus are to decide, by referenda held at least every four years, whether to fund extracurricular activities by a mandatory or voluntary student activity fee. Pursuant to the Regulation, undergraduate students at the SUNY Albany campus (hereafter "SUNY Albany") voted in referenda whether the extracurricular programs at that campus would be funded by a mandatory or voluntary student activity fee. During the relevant period, a small minority (approximately 20%) of the enrolled undergraduate students voted in the student activity fee referenda. A majority of the students voting in the referenda voted for a mandatory fee.

The student activity fees paid by all undergraduates at SUNY Albany fund the student association's student activity budget. That budget is submitted by the student government to the president of SUNY Albany for review. Under the Regulation, all allocations which the student association decides to include in its budget must fall within one of eleven categories in order to be approved by the SUNY campus administration. The only category which purportedly applies to the funding of NYPIRG is the first, "programs of cultural and educational enrichment".

Certification by the president of the SUNY campus that the student activities budget complies with section 302.14(c) authorizes the fiscal officer of each SUNY campus to collect the prescribed fee at registration. The fees so collected from each student are paid over to a disbursing agent designated by the student government and approved by the campus president or his designee.

The student association at SUNY Albany has consistently used the student activity fee to fund a variety of organizations,

including student ethnic groups (*e.g.* the Black Alliance, Fuerza Latina, the Irish Club, the Korean Students Association) and subject interest groups (*e.g.* the dance, theater and new arts councils), and "activist" groups (*e.g.* the Feminist Alliance, the Gay and Lesbian Alliance, the Revisionist Zionist Alternative ("RZA") and NYPIRG) and others. These groups, except for NYPIRG, were all based on the SUNY Albany campus.[4]

At all relevant times, the student association at SUNY Albany has included substantial amounts for NYPIRG in its budget. In each year during the relevant period, the President of SUNY Albany or his designee approved the student association student activities budget, including the allocation to NYPIRG.

The relationship between NYPIRG and the student association at SUNY Albany is different from that between the student association and campus groups. By the terms of a contract between NYPIRG and the student association, only NYPIRG, of the more than 50 student activities funded through the mandatory student activity fee, is funded on a per capita basis, *i.e.*, $3.00 per undergraduate student per semester. Pursuant to this contract, because there were approximately 9,500 enrolled undergraduates at SUNY Albany in academic year 1989-90, NYPIRG was allocated $57,600 for that year.[5] NYPIRG's allocation is also

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[4] In addition to the activities that are included in the student association budget, and thus subsidized by students, there are student activities that are "recognized", but not funded. The "recognized" activities, including such groups as the Young Republicans and Young Democrats, are given access to campus facilities by the SUNY administration and are permitted to operate on campus.

[5] Of the many student activities that are funded by the mandatory student activity fee, only the allocation to NYPIRG, to United States Student Association and to the Student Association itself are lump-sum expenditures, with no itemization provided in the Student Association budget. By contract with the student association, NYPIRG receives four lump-sum distributions

(continued...)

unusual in that NYPIRG's funding is the subject of a separate advisory referendum held during some of those years. It is noteworthy that NYPIRG's paid staff members assisted in NYPIRG's campaign in these referenda and that in addition to their salaries NYPIRG pays for the cost of printing leaflets and posters out of its general funds. As a result, objectors' money pays for the costs incurred by NYPIRG to campaign against their position on funding, and to perpetuate a funding system they abhor.[6]

NYPIRG is a not-for-profit corporation incorporated in 1973 under the laws of the State of New York, with its principal office in New York City. NYPIRG is a state-wide organization, whose board of directors consists of students from the schools at which NYPIRG has chapters. Local campus chapters are responsible for implementing NYPIRG policy at participating schools, and cannot take positions contrary to those adopted and

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[5](...continued)
each academic year from SUNY Albany.

The comparative magnitude of NYPIRG's allocation is enormous; it receives the largest stipend by far of all student groups, except for the student association itself, the state-wide umbrella organizations of student associations at all SUNY campuses, and a conference center used by numerous student groups. NYPIRG's generous stipend is even more striking on a per capita comparison: there were and are only about 40 students active in the SUNY Albany chapter of NYPIRG and only about 10 to 20 who were interns with NYPIRG; NYPIRG received $57,600 from the SUNY Albany Student Association, or over $1,400 per active student. By comparison, RZA, which had 25 to 30 active members, received a total of only $2,400, or less than $120 per active student. Other student activities, with the exception of the student government itself and the conference center, were allocated amounts on a per member scale and on a gross amount scale orders of magnitude less than NYPIRG.

[6] When student referenda were held at SUNY Albany regarding NYPIRG funding only a small minority of the registered students voted, typically no more than 20% of the undergraduate students.

approved by the state board.

Unlike other student groups funded by the student activity fee, NYPIRG is not solely a student group: its members include not only students (according to NYPIRG's by-laws, every student who pays a student activity fee which is used in part to fund NYPIRG, is a member, see App. at 8 A), but it also has "hundreds of thousands" of non-student contributors and approximately 40,000 "citizen members" who contribute at least $20 each per year. App. at 7 A.

Also unlike other student groups funded through the student activity fee, NYPIRG's principal executive offices are located off-campus in New York City, where most of its professional staff is based. NYPIRG employs a paid, full-time, non-student staff, more than half of whom are not located on any college campus. NYPIRG has approximately 15 registered lobbyists, all of whom are paid staff and none of whom is an undergraduate SUNY student. These NYPIRG paid staff members engage directly in lobbying the State Legislature and executive departments and agencies. Of all the student groups funded through the mandatory student activities fee, only NYPIRG has full-time paid lobbyists.

NYPIRG's overall budget is approximately $2.7 million, of which approximately 30% is derived from student activity fees, about 45% is obtained from door-to-door canvassing by paid canvassers, 15% is earned by "program activities", primarily NYPIRG's fuel-oil buying group, which serves primarily non-student homeowners, and 10% is grant income. Funds from all sources, except grants which may have restrictions, are commingled into a "general fund" from which all of NYPIRG's statewide expenses are paid. Hence, the student activity fee helps to pay all of NYPIRG's costs. App. at 6 A.

NYPIRG unquestionably has a program for affecting political and social action. App. at 8 A. From its inception, NYPIRG has pursued an ideological and political agenda, seeking

to achieve social change and to "shape public policy". The Court of Appeals held that "There is no doubt that NYPIRG, like many other student groups, is an ideological organization....While [the issues it pursues] range from local concerns...to international issues, they represent positions staked out by advocates and cannot be said to be neutral." App. at 8 A.

NYPIRG is the outgrowth of the 1960's student movement and the post-1960's consumer movement; its spiritual "father" is Ralph Nader, the well-known consumer advocate. The concept of "public interest research groups" ("PIRGs") was originally articulated in the book written by Ralph Nader and Donald K. Ross, ACTION FOR A CHANGE (revised ed. 1972). Nader's notion of the public interest research group is an organization "...composed of full-time professional advocates and able organizers recruited by and representing students as citizens [which] can have an enormous, constructive impact on society." [*Id.* at 11] Not only are PIRGs a vehicle for students to change society, they have taken on a particular ideological perspective.[7]

NYPIRG replicates Nader's blueprint in almost every

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[7] A review of the issues on which NYPIRG took positions, and the positions they took on these issues during the decade of the 1980's disclose a discernible pattern and remarkable consistency over the period. Such consistency is surprising in an organization that is "directed by students", because during that period there would have been more than one complete turnover in student population. As Nader himself pointed out, however, the full-time staff provides the continuity.

Plaintiffs' expert witness at trial described NYPIRG's ideology as "statism": "NYPIRG invariably comes down on the side of regulation of activities." Thomas Carroll, one of the plaintiffs, also testified that NYPIRG, in his review of the positions it took when he was a student and later when he worked on the staff of the state legislature, generally favored increased government intervention. NYPIRG members themselves view the organization as having a left-of-center political or ideological "tilt". These observations are confirmed by a review of NYPIRG's own publications.

aspect: it is an organization that employs over 60 professionals, including lawyers, paid lobbyists, scientists, professional organizers and others, whose salaries account for approximately 54% of NYPIRG's annual budget of around $2.7 million, or approximately $1.4 million. Less than 20% of the salaries is paid to NYPIRG's campus-based "project coordinators".

Moreover, as the Court of Appeals recognized, NYPIRG spends a substantial amount of money on off-campus activities; indeed, the organization's focus is off-campus. NYPIRG's manual[8] distinguishes between student lobbies and PIRGs:

> The Public Interest Research Groups represent a different thrust in the post-1960's student movement. However, while student government lobbies [such as the Student Association of the State University, an umbrella group for student associations at SUNY campuses] focused on the role of "student as student", the PIRGs represented the concerns of "students as citizens." The student lobbies helped students protect their interests within the higher education system, the PIRGs directed student interest outwards into the surrounding community. [emphasis supplied]

NYPIRG's own description of its purpose demonstrates its fundamentally political character.[9] The "masthead" of each issue

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[8] NYPIRG Board of Directors Manual at 9 [undated].

[9] While strictly speaking NYPIRG is "non-partisan", it clearly attempts not only to effect legislative and regulatory action, but also to influence the outcome of legislative, congressional and gubernatorial elections. It actively engages in the electoral process by publicizing candidates' positions on issues of concern to NYPIRG, and by sending "truth squads" to challenge candidates' positions on issues of concern to NYPIRG. In election years, an issue of Agenda is dubbed a "Special Election Issue", and is used to highlight candidates' positions on issues of concern to NYPIRG.

of Agenda for Citizen Involvement, NYPIRG's principal periodical, states: "NYPIRG's professional staff works to shape public policy and develop citizenship skills in the areas of consumer protection, government and corporate accountability, and economic and social justice." [emphasis supplied]. NYPIRG clearly has, and attempts to propagate, a "legislative program". Regularly, Agenda states the NYPIRG's political objectives and legislative program: each year an issue is subtitled "NYPIRG's Legislative Program".

Almost every issue of Agenda is replete with stories about NYPIRG's legislative victories, and almost every issue has an update on the status of bills NYPIRG is working to have enacted. NYPIRG broadly proclaims its lobbying successes. See App. at 8 A. NYPIRG's principal activities include substantial direct lobbying of state and local legislative bodies, executive agencies and regulatory bodies; community and group organizations; participation in coalitions of like-minded political or community action groups; and research in support of its positions.[10]

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[10] Student activities in NYPIRG are directly related to NYPIRG's statewide political and legislative agenda. For example, students, both on campus and as legislative interns, work on organizing rallies, lobbying, writing reports, mobilizing the community and contacting the media on the same issues that the statewide organization and its paid staff lobby on. NYPIRG's "educational" activities are directly related to its legislative and social action program, and are designed to train students and community members in lobbying and other political techniques. NYPIRG does not educate students in the abstract or in theory, and it does not allow students to present both sides of the issue to any audience. Rather, it is a monolithic, result-oriented political advocacy group.

In 1989, NYPIRG had only six student legislative interns, and in 1988 it had only seven student legislative interns, only two of whom were from SUNY, and, as previously indicated, only between 10 and 20 SUNY Albany students per year have been actively involved in NYPIRG on-campus internships. Only approximately 40 have been involved in running the NYPIRG SUNY Albany chapter. These are insignificant numbers when compared with the undergraduate student population of the 17 or so SUNY

(continued...)

Many of the issues with respect to which NYPIRG has lobbied and sought to influence public policy during recent years have been focused on issues that do not affect students as students, and include lobbying or demonstrating (1) against nuclear generation of electrical power; (2) in favor of nuclear disarmament; (3) in favor of establishment of citizen's utility boards ("CUB"); (4) in favor of extension of the statute of limitations for toxic tort actions; (5) in favor of divestment by U.S. companies of their holdings in South Africa; (6) against garbage incineration, against landfills, and in favor of "total recycling"; (7) in opposition to the federal government's defense budget and policies; (8) against the use of irradiated food; (9) for increased child care; (10) against "misleading" advertising by insurance companies.[11]

The issues on which NYPIRG takes positions, lobbies, "educates the public", and organizes "the community", are matters of public controversy. Most are not "campus" issues. Individual campus chapters, and by extension, students at each campus, have no control over the issues on which they can work through NYPIRG because the issues on which NYPIRG members and chapters work must be approved by the 36-member statewide board of directors.[12] No one SUNY campus' chapter has more than four members on the board. There is, indeed, no local campus or individual initiative as to the projects a student may

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[10](...continued)
campuses at which NYPIRG has chapters, and even glaringly insignificant compared with the 9,500 undergraduates at SUNY Albany alone.

[11] NYPIRG litigates and contributes funds to support litigation in furtherance of its program and objectives having little or nothing to do with student issues. Litigation is one of the five tactics listed in the NYPIRG Board Manual (at 67) to be used to achieve NYPIRG's political goals.

[12] The chairperson of the NYPIRG board admitted that the board was often not presented with divergent points of view during its deliberations, especially if the issue was "ongoing" and had been approved by a prior board.

undertake as a NYPIRG project.

NYPIRG's by-laws provide that any student who pays the student activity fee, even if, as at SUNY Albany the fee is mandatory, is a "member" of the organization. On the basis of this provision, NYPIRG claims to represent all students at the participating SUNY (and other public and private university) campuses. No other student group makes a similar claim to speak for all students.

NYPIRG was far from the only vehicle by which SUNY Albany students could participate in government or get "hands on" civics education. During the relevant time period, SUNY Albany permitted students to receive academic credit for participation in community, social or government work through projects, through internships, or through independent study courses taken under the supervision of a faculty member. Many students, including undergraduates, enrolled for internship credit through the School of Social Work's Community Service internship program, through which students obtain a course credit for volunteer work with a wide range of approved non-profit organizations, of which NYPIRG is only one of 274. Of these 274 approved non-profit organizations only NYPIRG and the student association itself were funded through the mandatory student activity fee, with the possible exception of a day care center that may have received some SUNY funds. None of the others were funded by the university or the student association.

The other 270-plus organizations through which SUNY Albany students have the opportunity to get "hands on" civics experience through internship programs for academic credit are not subsidized by the student body or the university. One striking example listed in the "Community and Public Service Program" manual as one through which students can earn credit for internship work is the State Assembly of New York.

The students challenged the forced funding of NYPIRG by commencing an action in the United States District Court for the

Southern District of New York. After a bench trial, the district court found that there was no infringement of the students' First Amendment rights by SUNY's transfer of student activity fee monies to NYPIRG, and also found that "the fact that some of NYPIRG's activities involve issues of public policy does not diminish its educational value. The educational value lies in the participatory civics training obtained by the students who take advantage of this opportunity." *Carroll v. Blinken*, 768 F.Supp. 1030, 1033 (S.D.N.Y. 1991). The district court also found that the funding of NYPIRG contributed to an "open forum for discussion and debate." *Id.* at 1035. The district court dismissed the complaint.

Although the Court of Appeals recognized the constitutional infringement inherent in the mandatory student activity fee, it found that SUNY had a "substantial interest" in fostering a rich extracurricular life for students (App. at 19 A), supporting the "educational" benefits of NYPIRG's teaching of specific, concrete skills in researching, public speaking, organization and advocacy to those who join it (App. at 20 A) and stimulating "uninhibited and vigorous discussion on matters of campus and public concern" (App. at 21 A). The Court of Appeals held, however, that these interests did not extend beyond the campus. App. at 24 A. The court also held that the membership provision of NYPIRG's by-laws directly infringed the students' rights of association. App. at 27 A.

The Court of Appeals affirmed the district court's judgment with respect to the allocation of student activity fee money to NYPIRG and the use of that money on campus, reversed in part, and remanded the case to the district court with instructions that the district court fashion a judgment that will ensure that NYPIRG "spend as much money at SUNY Albany as it receives from Albany students' fees, and eliminate NYPIRG's automatic membership scheme." (App. at 28 A).

REASONS FOR GRANTING THE WRIT

I

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT AND ALTHOUGH THIS COURT HAS NOT DETERMINED THE PRECISE QUESTIONS PRESENTED, THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S PRECEDENTS

This case implicates core constitutional values that are the hallmark of a free society and protect the rights of individuals from government encroachment. It concerns individual students' First Amendment freedom from being compelled to finance the political and ideological speech of others with which they do not agree.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990)(hereafter "*Keller*"), this Court explicitly acknowledged that the basis of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (hereafter "*Abood*") was "Thomas Jefferson's view that 'to compel a man to furnish contributions of money for the propagation of ideas which he disbelieves is sinful and tyrannical.'" [quoting I. Brant, James Madison: The Nationalist 354 (1948)]. This Court has implemented Jefferson's thought in the context of labor unions and bar associations. The Court of Appeals also quoted Thomas Jefferson, but emasculated his meaning by permitting a mandatory fee to be collected and given to a political advocacy group, so long as that group spends the equivalent amount on campus. This case gives this Court the opportunity to vindicate Thomas Jefferson's sage words in the context of colleges and universities.

The issue is a variation of the issue which this Court has taken up in the context of labor union fees and bar association dues. The continuing importance of the issue is shown by the number of times in recent years the Court has granted review in

cases concerning union fee and bar association dues arrangements. *E.g. Lehnert v. Ferris Faculty Association*, 500 U.S. ___, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991)(hereafter "*Lehnert*"); *Keller*; *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (hereafter "*Hudson*"); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984); *Abood*. This case presents an opportunity for the Court to apply the First Amendment and the teaching of these cases upholding the freedom from being compelled to finance political speech and action in the important realm of education.[13]

This Court has reiterated the rationale for the prohibition of forced funding of political activities most recently in *Lehnert*, where it recognized that

> By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." Maynard, 430 U.S. at 715....The First

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[13] This case is important not only because it directly affects 9,600 students at SUNY Albany, and more than 100,000 students at the approximately 17 SUNY campuses that have NYPIRG chapters, but also because there are PIRG chapters, similarly funded out of student activity fees or the budgets of the student associations, on college and university campuses throughout the country, such as several City University of New York campuses, the University of Wisconsin, the University of Maryland, Rutgers (the State University of New Jersey), the University of Minnesota, Oregon State University, the University of Washington, Florida State University, Colorado State University, the University of New Mexico, the University of Connecticut, and others. Literally hundreds of thousands of current, and untold numbers of future, students at public colleges and universities will be affected by the ruling regarding mandatory funding of PIRGs. Moreover, a ruling by this Court in this case could well also affect the funding of other ideological and political action groups which are subsidized by student governments out of mandatory fees.

> Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights...is constitutionally impermissible.

114 L.Ed.2d at 591.

The Court of Appeals recognized that the SUNY funding mechanism amounted to forced funding as much as the dues collection in the labor union and bar association cases, that it gives rise to "compulsion", and it also recognized that the use of compelled funding itself was sufficient to prove the violation of the students' associational rights. App. at 14 A - 16 A.

In upholding the use of mandatory student activity fee money to finance NYPIRG's concededly ideological political activities on campus, and requiring merely that a system be implemented to insure that NYPIRG spends the same amount on campus as it receives from student fees, the Court of Appeals (i) failed to follow the precedents of this Court in *Abood* and its progeny; (ii) failed to find that the interests of the state are "compelling", as required by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Hudson*, and most recently in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 139, 108 L.Ed.2d 652 (1990);[14] and (iii) failed to determine whether, even if the state's purposes are compelling,

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[14] In *Austin v. Michigan Chamber of Commerce*, *supra*, this Court applied the compelling state interest standard in upholding the Michigan Campaign Finance Act, which prohibits corporations from using corporate treasury funds for independent political expenditures, and required instead that separate, segregated funds be used for such expenditures. 108 L.Ed.2d at 662. The Court applied both the "compelling governmental interest" and "narrowly tailored" criteria.

that funding of political groups on campus by a mandatory fee is a means "carefully tailored" to avoid unnecessary infringement of dissenting students' First Amendment rights, as mandated by this Court in *Hudson*.

This Court's teaching, in the mandatory fees line of cases from *Abood* to *Keller* to *Lehnert*, is that to justify the burden on dissenters' core First Amendment freedoms the state must demonstrate a "compelling" interest that is being served by the burdensome regulation, that the regulation be "narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Hudson*; *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1968) and that the activities thus funded be "germane" to the compelling state interest.[15]

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[15] The Court of Appeals' apparent conclusion that a First Amendment intrusion may be justified by something less than a compelling state interest is an incorrect reading of this Court's cases. It rests, at bottom on the view that this Court in *Abood* displaced the compelling state interest test -- the traditional strict scrutiny standard by which First Amendment intrusions are measured -- with a "germaneness test", and that "germaneness" is a lower standard. Petitioners submit that *Abood* did not substitute "germaneness" for "compelling interest".

The Supreme Court plurality in *Abood* built its reasoning initially on an identified compelling governmental interest in labor peace. Only then did Justice Stewart employ "germaneness" in his analysis of the permitted intrusion on the non-members' First Amendment freedoms (*see also Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 at 455-456 (1984)). As applied in *Keller*, the concept of "germaneness" is applied to determine whether the use of compelled funding is appropriate to achieving the "compelling" state interest of regulating the bar.

In this case, therefore, the SUNY defendants were obligated to demonstrate a compelling state interest justifying the use of governmentally enforced exaction of contributions from students to finance political and ideological speech and action by NYPIRG. Only if such a compelling interest is shown, does the inquiry turn to whether the use of the money is "germane" to that state interest. The concept of "germaneness" incorporates the notions of relatedness and appropriateness or suitability. Webster's New

(continued...)

There was no dispute in *Abood* that the union conferred benefits on non-member employees, nor was there any dispute in *Keller* that the California State Bar performed functions that were useful or even necessary for the legal profession. The issue in the instant case, as it was in those cases, is whether particular activities of the organization whose funding is challenged are necessary to its discharge of its compellingly necessary or useful functions. Thus, in *Keller*, this Court adopted the *Abood* analysis that activities of private groups, even those vested with functions legislatively recognized as in the public interest, can be financed from mandatory dues only if the particular actions in question serve a state interest important enough to overcome the otherwise impermissible interference with dissenters' First Amendment rights. In *Keller* this Court held that the state bar could not constitutionally fund activities not germane to the legitimate goals which were mandated by the public interest, and examined various expenditures by the bar association. The court had little difficulty in finding that such activities as lobbying on issues such as use of polygraph tests by employers, prohibiting possession of armor-piercing ammunition, creating a right of action for air pollution, endorsing a gun control initiative, disapproving a senatorial candidate's statements on court review of a victim's bill of rights, endorsing a nuclear weapons freeze initiative, and opposing limitations on federal court jurisdiction over abortion, school

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[15](...continued)
Twentieth Century Dictionary (Unabridged)(2d Ed. 1980) defines "germane" as "1. closely related; closely connected; relevant, appropriate...." And it defines "appropriates as "3. fit or proper, suitable."

The "germaneness" notion is thus not a substitute for the required compelling state interest, but is an inquiry into whether that interest is being appropriately advanced by the particular use of extracted funds. That is as far as the majority in *Abood* found it necessary to go. This approach represents no deviation from the teaching of *Elrod v. Burns*, 427 U.S. 347, 362 (1976) and *Hudson*, 475 U.S. 292 (1986) or *Roberts v. United States Jaycees, supra*. A legitimate or "substantial" state interest is not sufficient to justify an infringement of core First Amendment rights. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

prayer and busing cases were at one "extreme end[] of the spectrum" for which compulsory dues could not be used. 110 L.Ed.2d at 15.[16]

In light of this Court's recent decisions in *Keller* and *Austin*, and consistent with *Abood*, the Court of Appeals' upholding of the use of student fees to fund political speech without identifying a compelling state interest for such use of students' money was error.

By merely drawing the line at the campus gate, and allowing forced funding of on-campus political speech, the Court of Appeals perpetuated the fundamental violation of students' First Amendment rights, and failed utterly to articulate a meaningful standard by which to draw the correct line[17] between the students' rights of speech and association and the interest in a free and vibrant exchange of ideas. This Court has never sanctioned the notion that government may restrict the speech rights of some to enhance the voice of others; indeed, "the concept that the government may restrict the speech of some elements of society in order to enhance the...voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1979).

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[16] The First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), applying *Keller* held that "Political activities, including lobbying, may be funded from compulsory dues so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal service....[T]he bar could not use dissenting members' funds to promote a system of no-fault automobile insurance, endorse a pro-life amendment...or generate support for a death penalty." 917 F.2d at 633. The similarity of the issues the Supreme Court found non-fundable out of compulsory bar association dues in *Keller* (and the First Circuit in *Schneider*) and the kinds of issues on which NYPIRG takes positions is apparent.

[17] The Court of Appeals was self-conscious of the fact that it was not drawing a "neat" line. App. at 28 A.

By approving forced funding of NYPIRG's political speech, the Court of Appeals limits students' free speech rights[18] in the supposed interest of the right of others to speak.[19] The right of others to speak is not threatened by Petitioners, so long as the speech is "free", not only in the sense that it is not restricted, but also in the sense that it does not make unwilling students the "instrument for fostering...an ideological point of view" they find unacceptable. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The reasoning of the Court of Appeals would permit (perhaps require) the student association to fund avowedly racist, fascist, communist, anarchist, nihilist, or other political groups if their activities take place on campus, regardless of their offensiveness to some students.[20] Again, we emphasize that all student groups have a prima facie right to speak on campus, but they do not have a right to use the money of those who do not share their views to propagate those views.[21]

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[18] These rights are limited because, as this Court said in *Wooley v. Maynard*, 430 U.S. 705 (1977), compelling speech is no less an infringement than banning or limiting speech, and because each student's funds, which might be used for that student's own speech, are reduced by the amount paid to the bursar, given to the student association and then sent to NYPIRG.

[19] By requiring only that the district court fashion a remedy that ensures that NYPIRG spend as much on campus as is extracted from students merely encourages NYPIRG to intensify its on-campus political organizing and indoctrination.

[20] To ensure that funding of speech was "content neutral".

[21] It is here that the distinction between "recognized" and "funded" activities is most appropriate. The university can recognize groups engaged in political speech and action, such as the College Republicans, Young Democrats, or Young Socialists, and may be obliged to make available to them facilities such as meeting rooms (see *Widmar v. Vincent*, 454 U.S. 263 (1981)), but it is not appropriate for SUNY to finance their speech using the money of unwilling students.

The Court of Appeals found that three governmental interests were furthered by the use of the mandatory student activity fee to finance NYPIRG. The state interests identified were (1) the general promotion of extracurricular activities; (2) the facilitation of "participatory civics training"; and (3) the stimulation of robust campus debate on a variety of public issues. App. at 19 A.

Rather than using the "compelling" state interest test, however, the Court of Appeals utilized a "substantial government interest" standard, heretofore used primarily in cases which arose out of the state placing time, place and manner restrictions on expressive conduct.[22] Indeed, there are no decisions of this Court in compelled dues or fees case that have used the looser standard.

In scrutinizing the substantiality of SUNY's interest in funding NYPIRG with student money, the Court of Appeals "accord[ed] wide latitude to universities to define and carry out their own educational missions," citing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589 (1967), and *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). App. at 18 A. Petitioners do not take issue with the general proposition that courts should not interfere with genuinely academic decisions of universities on matters within the proper realm of academic freedom. The universe of these decisions is, however, limited to matters of "who may teach, what may be taught, how it will be taught, and who shall be admitted to study" (Justice Frankfurter, concurring in *Sweezy v. New Hampshire*, 354 U.S. at 263, quoted by Justice Powell, announcing the judgment of the court in

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[22] The Court of Appeals cited *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989); *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981); and *United States v. O'Brien*, 391 U.S. 367, 377 (1968). These cases are inapposite to the issue of compelled funding of political speech.

Regents of Univ. of Cal. v. Bakke, 438 U.S. at 312-13). Petitioners also agree, that, absent an infringement on an individual's constitutional or statutory rights under the guise of academic decision-making, the courts should not intervene in these matters. But it is also indisputable that students do not surrender their constitutional rights at the school house gate. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969); *see also Healy v. James*, 408 U.S. 169 (1972). Deference to the determination of educators is not appropriate when their decisions infringe students' core constitutional rights. Further, the decision to fund NYPIRG does not fall within the confines described by Justice Frankfurter as the proper scope of academic freedom.

The Court of Appeals held that the funding of NYPIRG achieves an important governmental purpose because a broad extracurricular program is deemed important by educators,[23] and because SUNY Albany's president and the district court found that NYPIRG contributes to the education of students. From this, it made a transition to a standard of constitutional scrutiny that merely seeks to determine whether the state's interest would be less effectively served absent the activity fee regulation. App. at 23 A. The Court of Appeals, however, missed the mark, because while funding an extracurricular program may be educationally useful, funding political speech on campus is not necessary to a satisfactory extracurricular program, nor did it find that mandatory

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[23] The Court of Appeals ignored the distinction drawn by this Court between core educational, *i.e.* curriculum related, decisions and decisions regarding non-classroom, extracurricular activities. As the Court stated in *Board of Education v. Pico*, 457 U.S. 853, 869 (1982) concerning a school board's attempt to censor the books in the school library, "Petitioners [the school board] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway."

funding of the extracurricular program was a "narrowly tailored" intrusion.[24]

Nor can the mandatory funding of NYPIRG be justified as furthering a compelling state interest in teaching civic duty, when student participation in such activities is purely voluntary,[25] and when SUNY Albany itself recognizes over 200 other activities, including government internships, none of which is funded out of the mandatory fee, as qualifying for academic credit as community service. The appropriate inquiry is not, as the Court of Appeals thought, whether NYPIRG has an educational aspect, or whether it confers educational benefits,[26] but whether the conferring of the particular educational benefits is of "compelling interest" to the state.[27]

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[24] Nor could it have, because the SUNY student fee regulation itself provides for an option of a purely voluntary student activity fee. Thus the state itself, and the educators themselves, have recognized that the mandatory nature of the fee is not necessary to ensure "stability" and "predictability". *Cf.* App. at 24 A.

[25] It is difficult to reconcile a "compelling" state interest in education with voluntary participation by the student body.

[26] The students readily acknowledge that virtually any activity may have some "educational" aspect. Indeed, as the district court remarked, the petitioners in this case have been "educated" about the disadvantages of being on the losing side, much as a victim of a crime might be "educated" about the perils of being in Times Square after midnight by crossing paths with a felon. The state has no legitimate business imposing that kind of learning on its citizens.

[27] This case is quite different from cases in which students (or their parents) object to the use of tuition to pay for courses they find objectionable, for course selection falls squarely within the core educational discretion of the faculty and administration. It is also vastly different from a challenge to the use of a student activity fee to finance the football team or the glee club, because those activities do not implicate political speech.

The Court of Appeals held that the "most important" interest that SUNY Albany tries to advance by funding NYPIRG and other groups from the compulsory student activity fee is to "stimulate uninhibited and vigorous discussion on matters of campus and public concern" and that by funding campus interest groups the activity fee "create[s] a forum for expression of diverse views..." App. at 21 A. The Court of Appeals cited several cases for the general proposition that our democracy encourages the free and robust exchange of ideas.[28] The students have no quarrel with that proposition, indeed they champion it. The key word, however, is "free". A forum of ideas created out of forced exaction of financial support from dissenters can hardly be called "free".[29] Indeed, the notion that a "free marketplace" of ideas can be created and encouraged by involuntary contributions is an oxymoron. The strength of an idea, that is, its acceptance in the "marketplace", is often best measured by how many will volunteer to spread the idea or to help finance its propagation.

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[28] We submit that the Court of Appeals lost sight of the obvious fact that prohibiting mandatory funding of NYPIRG and other political and ideological groups "in no way...present[s] the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives", *Galda v. Rutgers*, 772 F.2d 1060, 1064 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), and thereby participate fully in the campus forum. Indeed, of all the organizations on campus, NYPIRG, with its budget of $2.7 million, would seem more than able to hold its own, even if it lost student dues and its income were reduced to a mere $1.9 million.

[29] The view expressed by the Court of Appeals at App. 21 A - 23 A that forced funding is properly used to create a "forum" of ideas is irreconcilable with its statement, at App. 17 A, that "The fact that appellants' student activity fee will also compel them to speak through a number of other campus groups in addition to NYPIRG in no way heals the constitutional infirmity; it simply means that students must fund more than one unwanted view." The irony is that the funding of political speech by any, or all, groups disadvantage[s] the students, including Petitioners, who are opposed in principle to state intervention in the "marketplace of ideas".

The Court of Appeals cited no authority, and we have found none, for the proposition that private funds can legitimately be used to finance a political group with which the students disagree so that the group's voice in the public forum or public debate is enhanced.[30] Indeed, this Court has taken the contrary position. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1979). The cases cited by it are far off the mark. Neither *Healy v. James*, 408 U.S. 169 (1972), *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), *Associated Press v. United States*, 326 U.S. 1 (1945), nor *New York Times v. Sullivan*, 376 U.S. 254 (1964), cited by the Court of Appeals, have anything remotely to do with whether the government can require citizens to fund a forum through compulsory dues or fees.

The Constitution, permits, and perhaps requires (*see Widmar v. Vincent*, 454 U.S. 263 (1981)), the university to allow

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[30] The case at bar does not involve the issue whether the government can use public monies to advocate a position on controversial issues. Here, the government is not speaking, it is a private group. And it is not even the government which is allocating resources, but the student association, a private group. The student association has no attributes of sovereignty; it is a special, limited interest group, like a labor union or bar association, and lacks the power of government. The difference between the student association and traditional government agencies and officials is exactly the same as the distinction between the State Bar of California and a state agency. *See Keller*, 110 L.Ed.2d at 13. The decision to make the fee mandatory is not made by the state, but by students. The student association budget, and thus the size of the student activity fee, is decided by the student association, not the school administration. The decision as to what organizations or activities are to be funded is not made by the SUNY administration or the SUNY Trustees, but by the student association, which has no expertise in education; SUNY officials only decide whether activities already approved for funding by the student association fall within the guidelines of the Regulation. The contract providing for payment to NYPIRG is between NYPIRG and the student association, not the SUNY Albany administration. There is no doubt that we are here confronted with involuntary funding of private political action and speech out of students' private property, not public funding of government action or speech out of general tax revenues.

political groups to speak on campus, to distribute leaflets, to put up posters and to use meeting facilities. It does not permit the university to force students to pay for any group's political leaflets or posters, or to subsidize the salaries of the group's paid staff who come to campus to direct or assist the political group.

The Court of Appeals did not find, nor could it have, that the mandatory funding of political action groups is either the least restrictive means of achieving the state's objectives, or even that it is "carefully tailored" to achieve those goals. Instead, the Court of Appeals found that "these interests would be less effectively served absent the activity fee distribution regulation." App. at 23 A. The "less effective" test is drawn from cases involving limitations on public demonstrations, not from forced funding cases, and is inapplicable.

As for the state's interest in supporting extracurricular life generally, section 302.14 of the Regulation evidences SUNY's recognition that voluntary student activity fees are appropriate (and, therefore, presumably "effective") in attaining that goal. If the state interest is in "the transmission of skills and civic duty", that opportunity is available through the more than 270 activities that are not funded through the mandatory fee but are recognized by the university administration itself as qualifying for academic credit.[31] If the state interest is the encouragement of a "forum", that can be, and is, achieved by sponsoring speakers' programs and the like, without funding the general activities of an avowedly

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[31] Of course, there may be hundreds of others that have not found their way onto SUNY Albany's official list, and which are neither funded nor "credited", but which nevertheless impart advocacy and organizational skills and notions of civic duty. As the Third Circuit in *Galda* noted, "The compelling state interest in eliminating 'free riders' in the interest of preserving labor peace in the union dues context...does not exist in the circumstances here....nor do we believe that the educational experience which [is cited by the university] as justification could not be gained by other means which do not trench on the plaintiffs' constitutional rights." 772 F.2d at 1066-1067.

ideological group.

Moreover, because any showing by NYPIRG that it has spent the same amount on campus as it received in student fees is necessarily after the fact, the Court of Appeals' mechanism for ensuring that the "on campus"/"off campus" distinction will be observed violates this Court's ban against collecting dues before the dues payer is informed of how the money will be spent, and before the dues payer can challenge the expenditure, established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). As the Court of Appeals acknowledged, the student activity fee could be structured to separate out that portion used for political activity and political advocacy, and that part made voluntary. That is what *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and *Keller* require. The failure of the Court of Appeals to follow those cases is unexplained and inexplicable.

II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS

The decision of the Court of Appeals for the Second Circuit in this case is in direct conflict with the decision of the United States Court of Appeals for the Third Circuit in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied* 475 U.S. 1065 (1986). In both cases, the Courts of Appeals were faced with the question whether it is constitutional for a state university to require students, as a condition of matriculation, to pay a fee to support a PIRG, which both courts recognized to be a political and ideological organization. In both cases the same rationales were advanced by the state and PIRG to justify forced funding. The Third Circuit court said "no". The Second Circuit court has said

"yes", if the money is spent on campus.[32]

Galda involved the funding of New Jersey PIRG (NJPIRG) at Rutgers, the State University of New Jersey. The Third Circuit Court of Appeals found that NJPIRG was a political action group, whose activities were primarily devoted to changing conditions outside the university. Like NYPIRG, New Jersey PIRG afforded those comparatively few students who chose to participate in its programs the opportunity to learn public speaking, research techniques, and leadership, advocacy and other skills. Thus the trial court in *Galda* found, as did the trial court in this case, that the university had "made a carefully reasoned decision that PIRG is a valuable educational adjunct...", 772 F.2d at 1063, and "PIRG has a very substantial educational component...[that] significantly enhances the educational opportunities available for students...." *Id.*[33]

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[32] The Third Circuit stated that it was not addressing the issue of whether the allocation of part of a the general activity fee to PIRG would be permissible. In *Galda* the NJPIRG portion of the student activity fee was separately itemized on the students' tuition and fees bill each semester. We submit that the difference between the Rutgers fee and the SUNY Albany fee is one of form, not substance. As we have pointed out above, the funding of NYPIRG is distinct from that of other groups at SUNY Albany, and similar to the funding mechanism for NJPIRG before *Galda* was decided because (1) it is based on a per student allocation unrelated to the number of students who actually participate in NYPIRG activities; (2) the student association has contractually obligated itself to fund NYPIRG; (3) there is a separate referendum on funding NYPIRG; (4) NYPIRG's allowance is a lump-sum, without an itemized budget as is the case for all other groups except the student association itself; and (5) the money is sent to NYPIRG's off-campus headquarters, where it is commingled with funds from NYPIRG's other revenue streams.

[33] As the Third Circuit in *Galda* noted, the educational advantages of NJPIRG described by the Court of Appeals "do not differ from those that might be obtained from working with, or for, an independent organization such as the Republican or Democratic Party, or a clearly religious group which has undertaken an active and vigorous proselytizing campaign", but

(continued...)

As the Third Circuit in *Galda* noted, however, "Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's frankly stated ideological bent. To that extent the educational benefits are only 'incidental' -- arising from or accompanying the principal objectives -- and subordinate to the group's function of promoting its political and ideological aims." *Id.* The experience gained from lobbying activities as well as advocacy, leadership, public speaking, and research might just as readily by obtained by membership in the University sponsored Legislative Action Committee, by participation in internships in various governmental agencies also available to Rutgers students, and through the work of other campus organizations." *Id.* at 1066. The same is true in this case.

As the Third Circuit acutely observed, "The objection to funding an outside entity through the 'neutral funding' procedure is that the result achieved is not neutral and does not achieve equal access. The process offers an opportunity for a majoritarian group to compel support from minorities in circumstances where no compelling state interest justifies the limitation on First Amendment rights." *Id.* at 1067. That is, of course, precisely what occurs at SUNY Albany.

The district court in this case was candid in acknowledging that the distinction between the case at bar and *Galda* was "slender", and that it felt that the dissent in *Galda* was "more applicable". The Second Circuit did not even try to reconcile its conclusion with the Third Circuit's holding that the funding of NJPIRG by a mandatory student fee was unconstitutional.

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[33](...continued)
it could hardly be contended that student fees could be funnelled to such a group. "Yet, the educational component that the University presents here as justification would be precisely the same were the group one that clearly could not receive affirmative state support." 772 F.2d at 1065. The same is true in this case.

CONCLUSION

In a free society, government-sanctioned restrictions on freedom of speech and association must be justified by the most compelling governmental interest, and must be narrowly drawn to minimize the infringement on individual rights. Review by this Court of the decision of the Court of Appeals for the Second Circuit is necessary to clarify the constitutional protection afforded to students' First Amendment rights in the face of attempts to compel them to support repugnant political speech and action through mandatory student activity fees and to rectify that Court's expansive interpretation of government interest that will permit serious intrusion on free speech rights. The Court of Appeals has set an erroneous precedent by misconstruing the applicable decisions of this Court and creating a "forum for expression of ideas" justification for exacting private funds that could destroy or seriously distort the free marketplace of ideas on which our system of government is based. The petition for a writ of certiorari should be granted.

May 12, 1992

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 698—August Term 1991

(Argued January 10, 1992 Decided February 13, 1992)

Docket No. 91-7877

THOMAS W. CARROLL, ROBERT J. CARROLL, MICHAEL E. MCCHESNEY, EMANUEL J. PANOS, EDWARD J. PRIOLA, CRAIG J. RUCKER, ROBERT T. SCHMIDLIN, BETH TURKOVIC GARFUNKEL, CHRISTINE MCCLELLAN, CHRISTOPHER SANDOR and SUSANNE ZIEGLER,

Plaintiffs-Appellants,

—v.—

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, GEORGE L. COLLINS, JR., D. CLINTON DOMINICK, JUDITH LASHER DUKEN, ARNOLD B. GARDNER, GURSTIN D. GOLDIN, JOHN L.S. HOLLOMAN, JR., NAN JOHNSON, EVERETTE JOSEPH, JUDITH DAVIDSON MOYERS, EDWARD V. MELE, VICTOR MARRERO, ROSEMARY SALOMONE, EDGAR A. SANDMAN, THOMAS VANARSDALE, DARWIN R. WALES, in their capacities as trustees of the State University of New York, JEROME KOMISAR, in his capacity as Acting Chancellor of the State University of

New York, VINCENT O'LEARY, CLIFFORD D. CLARK, ALICE CHANDLER, in his or her capacity as President and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Defendants-Appellees.

Before:

KAUFMAN*, PRATT and MINER,

Circuit Judges.

Appeal from a judgment for defendants of the United States District Court for the Southern District of New York (Owen, J.) in an action to enjoin defendant State University of New York at Albany from transferring, pursuant to state regulation, funds collected from plaintiffs' student activity fees to defendant New York Public Interest Research Group, Inc. Affirmed in part, reversed and remanded in part.

MARTIN S. KAUFMAN, Esq., New York, NY, (Atlantic Legal Foundation, Inc., Douglas Foster, New York, NY, of counsel), *for Plaintiffs-Appellants.*

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* Judge Kaufman wrote this opinion and circulated it to the other members of the panel before his death on February 1, 1992.

JOCELYN LEE JACOBSON, Esq., New York, NY, (Alexander R. Sussman, Fried, Frank, Harris, Shriver & Jacobson, New York, NY, of counsel), *for Defendant-Appellee New York Public Interest Research Group, Inc.*

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KAUFMAN, *Circuit Judge*:

Thomas Jefferson recognized that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1] At the same time, our nation's universities preserve a longstanding tradition of tolerating and even encouraging the propagation of all sorts of disbelieved opinions. We are asked today, in a case that involves competing concerns of the First Amendment, to resolve the conflict that occurs when Jefferson's "tyrannical" compulsion occurs in a collegiate setting. On the one hand, university students oppose as compelled speech and association their college's allotment of a portion of their mandatory student activity fee to an organization whose speech and actions they reject. On the other hand, the university, by disbursing the fee proceeds to a variety of campus groups,

1 *Keller v. State Bar of California*, 495 U.S. ____, 110 S.Ct. 2228, 110 L.Ed.2d 1, 11 (1990) (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)).

aims to foster spirited and uninhibited debate about campus and public issues. We hold that a state university may constitutionally allocate students' activity fees to a group with whose speech some students disagree, as long as that organization spends the equivalent of the students' contribution on campus and thus serves the university's substantial interests in collecting the fee. We also hold that a campus group may not define its membership to include all fee paying students, but may extend membership only to those who seek it.

BACKGROUND

This action began with a complaint by several students of the State University of New York at Albany[2] ("SUNY Albany") against their university and the New York Public Interest Research Group, Inc. ("NYPIRG"). Like all SUNY Albany students, appellants are required by a regulation adopted pursuant to New York's Education Law § 355 ("the regulation")[3] to pay a non-refundable student

2 The students have had varying ties to this litigation. Michael McChesney was academically dismissed between trial and judgment but is eligible to apply for reinstatement. Hence Judge Owen denied defendants' motion to dismiss, made on mootness grounds, calling McChesney's claim "capable of repetition yet evading review." Carroll v. Blinken, 768 F.Supp. 1030, 1031 n.1 (quoting Honig v. Doe, 484 U.S. 305, 318 (1988)). McChesney moved under Fed. R. Civ. P. 20 to add three new plaintiffs: Christine McClellan, Christopher Sandor and Susanne Zeigler. All are currently enrolled at SUNY Albany, and all assert a right to relief involving the same issues of law and fact and arising out of the same transaction or occurrence as McChesney's. The motion was therefore granted. Thomas Carroll, Robert Carroll, Craig Rucker, Emanuel Panos, Beth Turkovic Garfunkel, Edward Priola and Robert Schmidlin all graduated before trial, and thus seek damages only.

3 The regulation, 8 N.Y.C.R.R. § 302.14, provides that students at each SUNY campus will decide, by referendums held at least once every four years, whether to fund extracurricular activities by a mandatory or a voluntary student activity fee. During the years appellants attended SUNY Albany, and now, the fee is mandatory.

activity fee each semester. Those who fail to pay the fee, $55 as of 1989, are not allowed to register. Student fees are pooled and, according to the regulation, redistributed to a variety of extracurricular organizations, "provided that the purpose and activities of the organization[s] are of [an] educational, cultural, recreational or social nature." If the organizations fit that description, they must then request activity fee funding from, and be selected by, the SUNY Albany Student Association, and approved for such funding by the university's president.[4] The Student Association and the president have consistently used this process to fund a great many organizations, including athletic, social, recreational, service, ethnic and political organizations. For instance, the fee supports an Irish Club, the Korean Students Association, Dance, Theater and New Art Councils, the Black Alliance, the Pan-Caribbean Association, a geography club, Fuerza Latina, the Femi-

4 The Student Association budget may only allocate funds to:

(i) programs of cultural and educational enrichment;

(ii) recreational and social activities;

(iii) tutorial programs;

(iv) athletic programs, both intramural and intercollegiate;

(v) student publications and other media;

(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature;

(vii) insurance related to conduct of these programs;

(viii) administration of these programs;

(ix) transportation in support of these programs;

(x) student services to supplement or add to those provided by the university; and

(xi) remuneration to student officers for service to student government.

8 N.Y.C.R.R. § 302.14(c). Once the Student Association completes its budget allocating funds to various campus groups, SUNY Albany's president must then certify that Student Association funds are spent in one of the above 11 ways. *Id.*

nist Alliance, a campus Amnesty International group, the Revisionist Zionist Alternative, the Gay and Lesbian Alliance, NYPIRG and others. Activities conducted by the more ideological organizations range from sponsoring debates, supporting campus journals and newsletters, showing films, and lobbying.

By the terms of a contract between NYPIRG and the Student Association, NYPIRG receives $3.00 from each student's activity fee per semester, which amounts to a total of $57,600 for SUNY Albany students per year. NYPIRG is a statewide, not for profit corporation based in New York City with chapters on nineteen SUNY campuses. It is a self-described "nonpartisan research and advocacy organization directed by New York State college and university students." At SUNY Albany, students decide in an advisory referendum held every two years whether to fund NYPIRG through the activity fee, and have always approved it. NYPIRG's Board of Directors is composed entirely of students elected by participating students at the different SUNY chapters. Its overall annual budget is $2.7 million, roughly 30% of which is derived from campus activity fees. The remainder comes from door-to-door collecting (45%), commissions on NYPIRG's fuel buyers groups (15%), and grants (10%). Funds from all sources except grants are commingled into a "general fund," from which all of the organization's statewide expenditures are paid. Hence, student activity fee money helps to pay all of NYPIRG's bills.

NYPIRG spends money from its general fund both at and away from the SUNY Albany campus. For example, at the Albany campus, NYPIRG sponsored a professor's forum on the arms race, a symposium on women's health care, and a debate between representatives of presidential campaigns. Albany students used NYPIRG funds to study

the state of lighting in campus parking lots and underground corridors, aiming to enhance safety. They researched safety questions surrounding the use of irradiated food and worked for their elimination on campus. They undertook surveys on the drinking age, local supermarket pricing, local pharmacy compliance with the generic drug laws, and area bank policies on student credit cards. NYPIRG financed research at Albany on divestiture of state money from private institutions doing business in South Africa, the state statute of limitations in toxic tort actions, nuclear power issues and child care. Using NYPIRG funds, Albany students have participated in a small claims court assistance program, local toxic waste clean-ups, and voter registration drives.

NYPIRG spends considerable general fund money away from SUNY Albany as well.[5] Most obviously, it draws from this account to finance activities at the eighteen other campuses where NYPIRG has chapters. Likewise, general fund monies cover the administrative expenses that inevitably attend a large statewide organization. NYPIRG also uses the general fund to pay the salaries of some 60 full-time professional staff members, all but one of whom, as far as we can tell, is employed off the Albany campus. These employees are spread among other participating campuses, NYPIRG's legislative office at the state capitol, and NYPIRG headquarters in New York City. Their salaries consume 54% of NYPIRG's budget. They are scientists, lawyers, researchers, and organizers who, according to NYPIRG's bi-monthly publication

5 This is to expected, since NYPIRG is not primarily a SUNY Albany student group. SUNY Albany President Vincent O'Leary testified at trial that NYPIRG differs from all other campus organizations in that it is not based principally at the Albany campus. Indeed, NYPIRG boasts of 40,000 "citizen members," who contribute to NYPIRG and are not students at all.

Agenda, work "to shape public policy and develop citizen participation in areas of consumer protection, government and corporate accountability and economic and social justice." In pursuit of these goals, some NYPIRG staff members also lobby state legislators and executive officials. They do this both alone and with student members and interns.[6] One issue of *Agenda* boasts that NYPIRG's lobbyists had "helped pass over 80 pieces of legislation" by 1988.

There is no doubt that NYPIRG, like many other student groups, is an ideological organization. The issues it pursues, both at SUNY Albany and elsewhere, are chosen by the student Board of Directors. While they range from local concerns like the rates of area taxicabs to international issues like arms control, they represent positions staked out by advocates and cannot be said to be neutral. The organization is for some things—divestment, greater environmental protection, governmental accountability—and against others—irradiated food, nuclear power, increased defense spending. As the district court stated at trial: "I think you can sort of assume that from the state of this record without any dispute that [NYPIRG] does have a program for affecting political and social action. It is unquestionably so."

One final aspect of NYPIRG requires mention. NYPIRG's by-laws provide that any student who pays the student activity fee, as all SUNY Albany students must, is a "member" of the organization.[7] Apparently on the

6 SUNY Albany awards academic credit to a limited group of students who perform internships with NYPIRG.

7 The by-law provision is as follows:

II. *MEMBERSHIP*

A. *Participating School*

(*footnote continued*)

strength of this by-law, NYPIRG claims in publications to represent all students at the nineteen participating campuses. The record reveals no other student group with a similar, automatic membership plank, nor any other group that claims to speak for all SUNY Albany students.

Opposed to NYPIRG's causes and methods, and dismayed to find themselves financing them and, thus, NYPIRG members, appellants brought an action in the United States District Court for the Southern District of New York (Owen, J.) pursuant to 42 U.S.C. §§ 1983 and 1985(3), 29 U.S.C. §§ 2201 and 2202, and the First and Fourteenth Amendments of the Constitution. They sought to enjoin as unconstitutional compelled speech the allotment of part of their student activity fee to NYPIRG. After denying cross-motions for summary judgment, the district court conducted a six day bench trial. Finding no infringement of appellants' First Amendment rights by SUNY's transfer of activity fee monies to NYPIRG, and convinced that NYPIRG's use of such fees brings educational benefits to Albany students, the district court denied appellants' claim for injunctive relief and dis-

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A participating school is any public or private college, university, junior college, graduate school, or other institute of learning in New York State which makes an annual financial contribution to NYPIRG and which meets the standards of these By-Laws. An annual financial contribution is defined as funds paid as a substantial part of the term's collection, as determined by the State Board. The State Board, however, may refuse to admit any proposed participating school.

B. *Member*

A member is any student at a participating school except for:

1) At a school with a refund procedure, one who requests a refund.

2) At a school without a refund procedure, one who indicates her/his wish not to be a member.

Membership certificates or cards need not be issued by NYPIRG. Membership is effective and evidenced by the donation, refund, and other records kept by NYPIRG.

missed the action. *Carroll v. Blinken*, 768 F.Supp. 1030 (S.D.N.Y. 1991). Appellants now appeal, and we affirm in part, and reverse and remand in part.

DISCUSSION

As was noted at the outset, this case is one of competing interests. It pits students who object to bankrolling an organization whose political speech and activities they strongly oppose, against their university, whose considered educational judgment it is that students ought to support a wide variety of campus speech, civic activism, and extracurricular activities. We begin by considering the students' First Amendment claims; it is against their right to be free of compelled speech that we weigh the university's interests in compulsion.

I. *Objecting Students' First Amendment Interests*

Appellants' central claim is that the First Amendment prohibits their being charged for and associated with the political activities of an organization they disagree with. Since at least 1943, when the Supreme Court decided *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), it has been firm constitutional doctrine that the state cannot constitutionally compel individuals to speak or think in prescribed ways. In *Barnette*, the Court struck down a West Virginia law intended to bolster Americanism by compelling public school students to salute and pledge allegiance to our flag. As Justice Murphy concurred, the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 645.

What offended the First Amendment in *Barnette* was the image of state as molder of minds. That we were then

at war with governments founded expressly on that ideal, and indeed that the salute West Virginia school children were compelled to perform each morning seemed to parents and others to be "too much like Hitler's," could not have been far from the Justices' minds. *Id.* at 627, 641. Hence that passage so quoted by free speech enthusiasts ever since: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. But the freedom to keep silent as well as to speak is grounded in something broader than a national fear of the state. It is equally the product of our view of personhood, which encompasses what the Supreme Court later referred to as "freedom of thought," "freedom of mind" and a "sphere of intellect and spirit." *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977) (quoting, in part, *Barnette*, 319 U.S. at 637, 642). Were there no state at all, or were it inalterably benign, our conception of what it means to be human would still lead us to respect the individual autonomy of intellect and will enshrined in the First Amendment. *See Galda v. Rutgers*, 772 F.2d 1060, 1064 (3rd Cir. 1985), *cert. denied, New Jersey Public Interest Group, Inc. v. Galda*, 475 U.S. 1065 (1986) ("*Galda II*") (compulsory speech acts as "limitation on freedom of conscience").

The principles of *Barnette* have since been applied in a variety of contexts. In *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961), the Court struck down as invasive of "freedom of belief and religion" Maryland's requirement that civil servants utter oaths affirming belief in God. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held that a newspaper could not be compelled to print a reply by a political candidate criticized in

the paper. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court commanded that sheriff's employees could not be compelled to support a political party in order to keep their jobs. In *Wooley*, the Court invalidated New Hampshire's law compelling drivers to endorse that state's motto, "Live Free or Die," by displaying it on their license plates. And in *Pacific Gas & Electric Co. v. Pacific Utilities Commission of California*, 475 U.S. 1 (1986), a utility commission's rule requiring a company to distribute a consumer organization's communications with its bill was overturned as compelled speech. The Court reaffirmed the "concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id.* at 11 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524, 559 (1985) (quoting *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255 (1968) (emphasis in original))); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("[f]reedom of association therefore plainly presupposes a freedom not to associate").

The First Amendment's protections against forced speech and association also underlay the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, on which appellants place greatest reliance and which is most relevant to the case at hand. In *Abood*, non-union teachers were compelled by Michigan's agency shop rules to pay a service charge to the union that negotiated their collective bargaining agreement with the Detroit Board of Education, since they benefitted along with union members from the agreement's negotiation and operation. Claiming that the union's use of their service charge to express political opinions and support candidates constituted compelled

speech, the non-union teachers sued. The Court agreed, holding that while the union's use of dissenting teachers' money to finance activities germane to collective bargaining is constitutional, *id.* at 225-226, use of it to finance political or ideological causes the teachers do not support violates the First Amendment. "*[A]t the heart of the First Amendment*," the Court stressed, "is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-235 (emphasis added).

In *Abood*'s wake has come *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), which reaffirmed *Abood* and ruled on the germaneness of a variety of union practices, *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which strengthened union procedures to ensure that objecting employees did not finance nongermane speech, *Keller v. State Bar of California*, 495 U.S. __, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), which prohibited a state bar association from using members' dues on political speech unrelated to legal regulation or services, and *Lehnert v. Ferris Faculty Association*, 500 U.S. __, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), which sanctioned union expenditures of dues on expenses not expressly authorized by statute and for national affiliate activities that benefit local members.

Like non-union employees bound to pay fees to a union that in turn spends the money on political speech, or members of a state bar whose dues finance ideological activities like lobbying, appellants see the student activity fee and its attendant automatic NYPIRG membership as vehicles for compelled speech and association. *See Galda II*, 772 F.2d at 1067 (*Abood* relevant in university context, despite differences between colleges and unions).

We agree: NYPIRG engages in political speech, the students help to finance it, and that aid and the accompanying membership is compelled. First, no one doubts that NYPIRG "speaks" for First Amendment purposes. The district court concluded as much, as was noted above, because the record is clear that NYPIRG advances certain positions on issues of public policy through research, campus speakers, lobbying the legislature, intervening in lawsuits, community organizing, brochures, and other methods. Were the government to try to prevent or penalize these activities, it would certainly be restrained by the Constitution. Second, it is undisputed that all students pay $3.00 each for such speech, as money collected from student activity fees is lumped with NYPIRG's other funds at the statewide level and is distributed to individual chapters, staff members and lobbyists to support the group's efforts. That this slice of the student activity fee is briefly in the hands of the Student Association while being funnelled from students to NYPIRG does not diminish the fact that a transfer has taken place. Students are also drafted into NYPIRG according to the group's automatic membership provision. Finally, this membership and the transfer of funds hinges not on the ideological affinity between member and group, contributor and recipient, but rather on the compulsion inherent in conditioning registration, and hence matriculation and graduation, on payment of the fee. A student cannot pay the full fee without paying NYPIRG and he or she cannot continue as a student without paying the full fee. Whether justified or not, that is forced association and speech—just as conditioning the practice of law in *Keller*, and the retention of work in *Abood*, *Ellis*, *Hudson*, and *Lehnert*, on fee payments gave rise to compulsion in those settings.

Appellees maintain, and the district court agreed, that objecting students have not been forced to speak through and associate with NYPIRG because the connection between the two is too attenuated. As the court put it, "the fee supports over 100 diverse groups, and the contributions of the fee are paid by several thousand students. Thus, no close association exists between plaintiff and NYPIRG, and plaintiff's First Amendment rights are not infringed." *Carroll*, 768 F.Supp at 1035. As a matter of fact, this proposition may be doubted; as a matter of law, appellants need not show a "close[r] association" than they have to establish an infringement of First Amendment rights.

In fact, appellants are linked more closely to NYPIRG than to other recipients of the student activity fee because, as far as we can tell, only NYPIRG makes members out of all SUNY Albany students. Having deputized all of its unwitting activity fee contributors and then stating in some of its materials that it represents all fee paying students, NYPIRG cannot now conveniently restore the distance between itself and students when it suits the organization's legal needs. And, even absent the membership provision, it cannot so easily be assumed that outsiders do not link students with at least some of the causes pursued by student organizations, especially when those causes are furthered off campus. As the Fourth Circuit said of the plan of the University of Maryland's PIRG chapter to use activity fees to support litigation, "suits and actions would assume in the public mind the stature of declarations of University thought as well as that of its entire student body, while in truth it could well be neither." *Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864, 867 (4th Cir. 1977).

Perhaps more importantly, First Amendment jurisprudence does not require appellants to demonstrate a closer connection between NYPIRG's speech and themselves to make out a constitutional violation. While appellees are correct that *Barnette* and *Wooley* involve citizens compelled actually to speak or carry a message, nowhere did those opinions state or imply that compelled speech has only one *modus operandi*.[8] On the contrary, *Abood* and its progeny illustrate that there is linkage enough in being compelled to fund an unsupported cause.

> *By utilizing petitioners' funds* for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Maynard*, 430 U.S. at 715, 51 L.Ed.2d 752, 97 S.Ct. 1428. The First Amendment protects the individual's right of participation in these spheres from precisely *this type* of invasion.

Lehnert, 114 L.Ed.2d at 591 (emphasis added). *See also Cahill v. Public Service Commission*, 76 N.Y.2d 102, 111-12, 556 N.Y.S.2d 840, 843-44, 556 N.E.2d 133 (N.Y. 1990). Moreover, in *Lehnert*, the Court rejected appellees' position when advocated by Justice Marshall, who argued in dissent that merely funding union activities did not "conscript[ ]" dissenters' "expressive capacities." *Id.* at

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8 *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Widmar v. Vincent*, 454 U.S. 263 (1981), also stressed by appellees, are not to the contrary because they are not compelled speech cases. They hold only that, having once opened up physical space for public or campus use and advocacy—a shopping center in *Pruneyard* and classrooms in *Widmar*—the space's owner cannot then selectively restrict access. The critical distinction is that appellants have not voluntarily made their pocketbooks publicly accessible for the use of all others besides NYPIRG. Only the very regulation they challenge does that.

604 (Marshall, J., concurring in part and dissenting in part). The fact that appellants' student activity fee will also compel them to speak through a number of other campus groups in addition to NYPIRG in no way heals the constitutional infirmity; it simply means that students must fund more than one unwanted view. *See Galda II*, 772 F.2d at 1067 ("[f]or example, if the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded"). And since "the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect," *Lehnert*, 114 L.Ed.2d at 591, it is not dispositive that others receive appellants' funds along with NYPIRG. Appellants may agree with their speech and many recipients, being athletic, social and service groups, do not speak at all.

In short, appellants' right to be free from compelled speech suffers when NYPIRG uses student funds to raise issues on campus, organize the community and lobby the legislature in pursuit of "economic and social justice." Likewise their right to associate or not with whom they please is compromised by NYPIRG's automatic membership policy. These intrusions must be justified by the state.

II. *SUNY Albany's Interest in Funding NYPIRG from the Student Activity Fee and in NYPIRG's Automatic Membership*

Having set forth appellants' interest in averting compulsory speech and association, we must now consider the university's interest in funding NYPIRG from the student activity fee, and by extension allowing NYPIRG to make members of all who pay it. The regulation by which

NYPIRG and other groups receive a share of the fee is not intended to restrict free speech. On the contrary, it seeks to expand campus speech by facilitating the activities of a wide variety of speakers. And the funding provision is also content-neutral; that is, it does not grant or withhold funds based on the content of the recipient's speech. We therefore look to see whether the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989); *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981) ("[e]ven where a challenged regulation restricts freedom of expression only incidentally . . . [it] must be narrowly drawn to avoid unnecessary intrusion on freedom of expression"); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also* Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 Harv. L. Rev. 1904, 1905-1906 (1989).

It is also important to note that, in scrutinizing the substantiality of SUNY Albany's interest in funding NYPIRG with student activity fees and permitting the membership policy, we accord wide latitude to universities to define and carry out their own educational missions. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). Of course, "state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy v. James*, 408 U.S. 169, 180 (1972), but academic freedom is itself a concern of that amendment, and it would not long survive in any meaningful way if courts were to take upon the task of micromanaging the everyday affairs of our nation's colleges. *Id.* at 180-181; *Ewing*, 474 U.S. at 226; *Bakke*, 438 U.S. at

312-313; *Keyisian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 602-603 (1967).

A. *Funding*

SUNY Albany's reasons for allotting a portion of the student activity fee to NYPIRG can be distilled to three distinct interests: 1) the general promotion of extracurricular activities, 2) the facilitation of what the district court called "participatory civics training," *Carroll*, 768 F.Supp at 1033, and 3) the stimulation of robust campus debate on a variety of public issues.

First SUNY's regulation seeks to foster a rich extracurricular life for students at Albany and other campuses. A former chancellor of SUNY Albany put it this way:

> The experience of a student on any campus extends beyond a classroom experience. The basic philosophy of an educational experience in any institution that I am familiar with is to provide for a student as wide a range of opportunities and exposures which will allow for the development of the potentials of an entire individual . . . I would stress the importance of [students] reaching out during their undergraduate years to sample, to explore, to see various kinds of activities, because it is one of the rare times in an individual's life when you have an opportunity to learn a great deal more about different kinds of activities and events.

The value to students of participating in a range of extracurricular activities is not limited to the things they do and learn. It also involves the people they encounter in the process. As a president of Princeton University once wrote, "[a] great deal of learning occurs informally. It occurs through interactions among students . . . who

have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences." *Bakke*, 438 U.S. at 312-13 n. 48.

Inherent in SUNY's regulation, then, is a particular and of course quite common vision of the university as more than the sum of classes in its course catalog—as a sort of sanctuary where young adults grow in a myriad of ways. *See Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring) (university "atmosphere" includes extracurricular activities, "critical aspect[s] of campus life"). As was said of the use of a similar activity fee at the University of Nebraska, "[w]ithin wide limitations a state is free to adopt such educational philosophy as it chooses. The Board of Regents of the University of Nebraska obviously has embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom." *Veed v. Schwartzkopf*, 353 F.Supp. 149, 152 (D. Neb. 1973) (holding constitutional the granting of student activity funds to the campus newspaper), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). It is in service of a similar "philosophy" of education that SUNY Albany has established a scheme whereby a multitude of political, educational, social and recreational organizations receives funds from each student's payment of the student activity fee upon registration. The $3.00 allocation to NYPIRG is part of this scheme and, to the administration of SUNY Albany, is consistent with the university's desire to enrich the overall extracurricular lives of students.

The second interest SUNY Albany aims to serve by funding NYPIRG with student activity fees is more strictly educational. NYPIRG, the university believes, teaches specific, concrete skills—research, speaking, writing, organization and advocacy—to those who join it.

"Participating students in each area learn about their chosen project; prepare reports, memoranda and press releases; practice public survey techniques; involve themselves in community service efforts; obtain experience in public speaking; sponsor debates; and communicate with their legislative representatives." *Carroll*, 768 F.Supp. at 1032. NYPIRG also instills in students a sense of civic activism and responsibility. By learning about the political process, putting information before the public via research, speakers and debates, and working to change minds and raise consciousness, students enjoy what SUNY Albany President Vincent O'Leary called "an opportunity of participating, it would seem to me, in the most fundamental aspects of a democratic society." Or, as Judge Owen put it at trial, NYPIRG administers "a hands-on civics exercise." SUNY Albany has already demonstrated its interest in teaching students these skills by offering courses in research, writing and government; it may also seek to further that interest by allocating student activity fee money to organizations like NYPIRG that accomplish substantially the same things.

The final, and in our view most important, interest that SUNY Albany tries to advance by funding NYPIRG and other groups with shares of the activity fee is to stimulate uninhibited and vigorous discussion on matters of campus and public concern. At trial, President O'Leary testified that, by funding a wide variety of campus interest groups like NYPIRG, the activity fee "create[s] a forum for the expression of diverse views at Albany." Such a forum, he continued, is "consonant with the educational mission" of the university. In seeking to foster debate, exchange and contemplation about matters of campus and wider importance, SUNY Albany is hardly assuming a novel collegiate role. As Justice Brennan wrote in *Keyishian*, "[t]he

classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945)). Indeed, SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). This constitutional interest is no less forceful or applicable on campus than it is in the community at large. *Ewing*, 474 U.S. at 226 n.12 (academic freedom, "a special concern of the First Amendment," thrives on "the independent and uninhibited exchange of ideas"); *Healy*, 408 U.S. at 180-181. A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place.

Just as SUNY Albany is not unique in defining its role to include the nurturing of campus debate, neither is it unique in using a student activity fee as the means to that end. Other colleges do likewise. Of the allocation of student activity fees to several campus groups at a college of Rutgers, the State University of New Jersey, the Third Circuit commented that:

> This fee, a lump sum used to subsidize a variety of student groups, can be perceived broadly as providing a "forum" for a diverse range of opinion . . . Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of diverse views.

Galda v. Bloustein, 686 F.2d 159, 166 (3rd Cir. 1982) ("*Galda I*"); *Widmar*, 454 U.S. at 267-268 n.5 (1981) ("campus of a public university, at least for its students, possesses many of the characteristics of a public forum"); *Galda II*, 772 F.2d at 1064; *Kania v. Fordham*, 702 F.2d 475, 477 (4th Cir. 1983); *Veed*, 353 F.Supp. at 153.

We conclude that these three interests—the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate—together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG. We also believe that these interests would be served less effectively absent the activity fee distribution regulation. *Albertini*, 472 U.S. at 689.

Clearly, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities. Of equal importance is the stability and predictability the fee scheme provides; established organizations like NYPIRG that receive repeated Student Association backing can estimate their yearly funding with some accuracy and expect a steady annual flow of money. Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view.

While we agree with appellees that activity fee funding of NYPIRG furthers substantial SUNY Albany interests, we nevertheless agree with appellants that they cannot be charged for all NYPIRG expenditures. Taking SUNY Albany students' money and using it, as NYPIRG does, off Albany's campus—to, *e.g.*, pay non-student lobbyists, cover statewide administrative costs, finance other SUNY chapters—stretches the nexus between the extracted fee and SUNY Albany's educational interests too far, beyond what is constitutionally permissible. By allowing student money to finance NYPIRG at all we have already sanctioned a considerable infringement of appellants' freedom from compelled speech. *See Ellis*, 466 U.S. at 455 ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"). Moreover, we are mindful of our duty to ensure that even incidental burdens on speech be "narrowly drawn." *Schad*, 452 U.S. at 69 n.7. Hence we are unwilling to go farther than necessary to fulfill SUNY Albany's substantial interests, and do not believe that these con-

cerns can justify NYPIRG's off campus expenditures. Students opposed to NYPIRG can be made to tolerate some compromise of their First Amendment rights when the benefits of a varied extracurricular life, hands-on civics training, and robust campus debate are all around them to approvingly take part in, actively oppose, or merely witness dispassionately firsthand. *See Lehnert*, 114 L.Ed.2d at 590-591 (infringement of nonunion workers' First Amendment rights acceptable when they benefit from union's representation and would otherwise be "free riders;" rationale lost when union acts "outside the limited context of contract ratification or implementation"); *Keller*, 110 L.Ed.2d at 13. These benefits vanish when NYPIRG money is spent in the halls of the state legislature or at the main offices in New York City. SUNY Albany's interests, however substantial, are still, after all, those of the university and its community, not that of an independent statewide organization.

In an attempt to sever NYPIRG's constitutional expenditures from its unconstitutional ones, we could order the organization to segregate its accounts and trace activity fees through the group's funding pipeline—from award by the Student Association through NYPIRG's bank accounts and back to specific campus activities—to make certain no dissenting student paid for an off campus program. Or we could carefully scrutinize each NYPIRG project to see whether it is chiefly "off campus" or "on campus," and thus eligible or ineligible for activity fee funding. But, given our unwillingness to micromanage the affairs of universities and their student organizations, we are reluctant to immerse ourselves to this degree in NYPIRG's inner workings. Instead, we think it sufficient to require that NYPIRG spend as much money on activities at SUNY Albany as it takes in from SUNY Albany students

via their activity fees. For example, NYPIRG received $57,600 from Albany students' fees during the 1989-1990 academic year; if it again receives that amount from the Albany Student Association for the 1992-1993 academic year, it must put that figure from its general fund back into projects or expenses at SUNY Albany. This will ensure that, in effect, objecting students like appellants contribute only to NYPIRG programs at SUNY Albany, and not to off campus expenditures on such things as lobbying, staff salaries and administrative costs. We remand, therefore, and order the district court to fashion, as unintrusively as possible, procedures requiring NYPIRG to confirm in the Albany Student Association budgetary process that it spends at SUNY Albany the equivalent of Albany students' activity fee contribution.[9]

B. *Membership*

The interests that legitimize SUNY Albany's distribution of students' money to NYPIRG and a host of other organizations do not come close to being sufficiently substantial to justify NYPIRG's automatic membership policy. Once the activity fee has been used to set in place a campus where extracurricular options abound and ideological and other debate is vigorous, students need not be further linked against their will or knowledge with any student organization. Far from fulfilling SUNY Albany's

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9 We note that NYPIRG has already, in the past, submitted reports to the SUNY Albany administration detailing its various programs on campus. These reports were completed in response to requests from the administration, which sought to confirm that NYPIRG was spending activity fees "for the support of programs for the benefit of the campus community," as the regulation requires. Perhaps these reports can be submitted annually, if they are not already, and include specific evidence that NYPIRG spends as much on campus as it takes in from the activity fee.

interests in promoting campus pluralism and free choice among several avenues of informal learning, allowing one group to make members of all students gives it an unearned advantage in the campus competition for hearts and minds. More important, it puts the lie to appellees' argument that students are not linked in the popular mind with NYPIRG aims. NYPIRG expressly forges such a link when it proclaims that its "membership" includes all fee paying SUNY Albany students. By overtly and inaccurately claiming to represent the interests of the SUNY Albany student body, NYPIRG has irredeemably trangressed the proscription against forced association.

NYPIRG's membership provision raises similar concerns in this case as New Jersey PIRG's funding did in *Galda I* and *Galda II*. In those cases, NJPIRG was financed with a separate assessment, and was not simply an additional group taking from a larger activity fee as NYPIRG is here. "In that situation," wrote the Third Circuit, "a university's ability to insure a balance in access is infringed." *Galda II*, 772 F.2d at 1067. Here too, NYPIRG's membership provision amounts to special treatment that skews the university's otherwise neutral support of a variety of viewpoints. As automatic membership in NYPIRG serves no substantial SUNY Albany interest, the district court should order NYPIRG to redefine its membership to include only those students who consent to becoming members, and not simply every student who pays an activity fee.

CONCLUSION

The balance we have attempted to strike between the First Amendment's proscription of compelled speech and association and its concern for uninhibited advocacy and

academic freedom may disappoint those in search of decisional absolutes or neat line drawing. We believe it, however, to be a fair accounting of both SUNY Albany's substantial interests and appellants' right to be free of that compelled speech not narrowly in service of those interests. Accordingly, we affirm the allocation of activity fee money to NYPIRG, and reverse and remand with instructions that the district court ensure that NYPIRG spend as much at SUNY Albany as it receives from Albany students' fees, and eliminate NYPIRG's automatic membership scheme. Each party shall bear its own costs on this appeal.

APPENDIX B

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hole any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

APPENDIX C

8 N.Y.C.R.R. § 302.14
STATE UNIVERSITY OF NEW YORK
STUDENT ACTIVITY FEE REGULATION

***302.14** Student activity fees. (a) *Referendum.* Prior to the close of the academic year 1976-77 with sufficient time provided for the orderly budget planning of student activity programs, and every four years thereafter, the student body (or such components thereof as may be designated by the chief administrative officer, or his designee) at each State-operated campus shall determine by referendum whether student activity programs shall be supported by either voluntary or mandatory student fees. The implementation of the 1976-77 referendum determination shall become effective in relation to the appropriation, collection and disbursement of such fees for the 1977-78 academic year. The determination resulting from each referendum shall remain in force for a period of four academic years, except that at any time and from time to time within such four year period a

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* Notwithstanding the requirements for a student activity fee referendum during the 1976-77 academic year, if the student body at a State-operated campus conducted a referendum during the 1975-76 academic year, pursuant to the provisions of section 302.14 of this Title, the determination of such referendum shall become effective for the 1976-77 academic year and shall thereafter remain in force until the close of the 1980-81 academic year, subject to the continuing authority delegated to the representative student organization at each campus to conduct such a referendum at any time in accordance with the student activity fee policy.

subsequent referendum held in accordance with the constitution and by-laws of the representative student organization or organizations may effect a change in this determination with respect to the following academic year and to continue for the remaining portion of the four-year period.

(b) *Voluntary fees.* Where students at a State-operated campus have determined to make the payment of student activity fees voluntary, the representative student organization shall be responsible for the collection, appropriation and disbursement of such fees. With the approval of the chief administrative officer, or his designee, personnel or facilities of the campus, or both, may be used in connection with the collection of such fees on behalf of the representative student organization provided that the collection of voluntary student activity fees is clearly distinguished from the collection of required university fees.

(c) *Mandatory fees.* Where students at a State-operated campus have determined to make the payment of student activity fees mandatory, the appropriation, collection and disbursement of such fees, whensoever collected, shall be governed by the following regulations:

(1) Preparation and certification of the budget. The representative student organization shall prepare and approve a budget governing expenditures from student activity fees in accordance with the constitution and by-laws of the student organization, and consistent with the principles of equal opportunity, prior to registration for each term. Allocations included in the budget shall fall

within programs defined in paragraph (3) of this subdivision. The approved budget shall thereafter be presented to the chief administrative officer prior to the registration for each term for his review and certification that the allocations are in compliance with the provisions of paragraph (3) of this subdivision. In the event that the chief administrative officer, or his designee, concludes that a particular proposed allocation may not be in compliance with the provisions of this Part, he shall refer such proposed allocation to a campus review board composed of eight members of whom four shall be appointed by the representative student organization and four appointed by the chief administrative officer, or his designee. The campus review board shall study the proposed allocation and make a recommendation with respect to it. The chief administrative officer, or his designee, shall thereafter make the final decision. Any proposed allocation which is determined not be [*sic*] in compliance with the provisions of these regulations shall be excluded from the budget. Upon determination by the chief administrative officer, or his designee, that the approved budget is in compliance with these regulations, he shall so certify, and such certification shall authorize the collection of the fee at registration.

(2) Collection at registration. Upon registration, every student shall be required to pay a fee, or proportionate part thereof for the term for which he registers, as may have been fixed and assessed by the representative student organization to the extent that such fee does not exceed an amount to be determined by the chancellor in consultation with the student assembly. Failure to pay the required fee may result in denial of registration. The

fiscal officer of each State-operated campus shall collect the prescribed fee at the time of registration and shall pay over the amounts so collected to a custodial and disbursing agent designated by the representative student organization and approved by the chief administrative officer, or his designee. If there is reasonable evidence in an individual case, as determined by the chief administrative officer, or his designee, that payment of the fee may cause undue hardship, such student may nevertheless be allowed to register and his obligation to pay such fee shall thereafter be subject to administrative review and action by the chief administrative officer, or his designee, after consultation with the representative student organization. In a case in which a student has been allowed to register without payment of the student activity fee, the chief administrative officer of the campus concerned may withhold grades or transcripts of credits until payment has been waived by such administrative action or the obligation has been met. In addition, the representative student organization may determine to deny participation in student activities in the case of any student who has not fulfilled his obligation with respect to payment of the mandatory student activity fee. Student imposed fees in excess of the mandated fee shall be considered voluntary within the provisions of subdivision (b) of this section. Policies governing refunds to students who cancel their registration or withdraw from the university shall be established by the representative student organization.

(3) Use of funds. Funds which are collected under provisions of this section which require every student to pay the prescribed mandatory fee shall be used only for

support of the following programs for the benefit of the campus community:

(i) programs of cultural and educational enrichment;

(ii) recreational and social activities;

(iii) tutorial programs;

(iv) athletic programs, both intramural and intercollegiate;

(v) student publications and other media;

(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature;

(vii) insurance related to conduct of these programs;

(viii) administration of these programs;

(ix) transportation in support of these programs;

(x) student services to supplement or add to those provided by the university; and

(xi) remuneration to student officers for service to student government.

(4) Disbursement of funds. Proceeds of the student activity fee shall be disbursed by the representative student organization, through the designated custodial and disbursing agent, provided that the fiscal commitment for each expenditure shall have been approved by the chief administrative officer, or his designee. In the event that the chief administrative officer, or his designee, concludes that a particular fiscal commitment may not be in

compliance with an approved budgetary allocation and the provisions of this section, he shall refer such proposed fiscal commitment to the campus review board for review and recommendation. Final determination for approval of the compliance with this section of any fiscal commitment shall rest with the chief administrative officer or his designee. Fiscal and accounting procedures prescribed by the chancellor, or his designee, shall be adopted and observed by the representative student organization. These procedures shall include, among other things, provisions for an annual audit.

(5) Changes to approved budget. Changes to the approved budget after certification, either prior to or subsequent to the collection of mandatory fees, shall be subject to administrative review and certification by the chief administrative officer, or his designee, in the same manner as was applicable to the original budget.

(d) *Use of college facilities.* The provisions of this section shall not be interpreted to authorize the use of college facilities for student activities and programs without appropriate administrative approval.

Supreme Court, U.S.
JUN 10 1992
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No. 91-1831

In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, et al.,

Petitioners,

v.

DONALD M. BLINKEN, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AVERELL SMITH, ET AL., IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AVERELL SMITH, ET AL., IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the objecting students in *Smith v. Regents of the University of California*, 2 Cal. App. 4th 750 (1992) (review granted by the California Supreme Court March 26, 1992, No. S006588), respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioners, Thomas W. Carroll, *et al.* Consent to the filing of this brief has been granted by counsel for

petitioner and has been lodged with the Clerk of this Court. Respondents, Donald M. Blinken, *et al.*, have withheld their consent, thus necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The objecting students in *Smith*, led by Averell Smith, have been challenging the University of California's use of mandatory student fees for political and ideological activities for 13 years. The outcome of this case will greatly affect the *Smith* students' efforts to vindicate their constitutional rights.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the compelled fees area (be they student fees, agency shop

fees, or state bar dues) will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Gibson v. Florida Bar*, No. 90-1102, *cert. dismissed*, 502 U.S. ___, 116 L. Ed. 2d 432 (1991); and *Lehnert v. Ferris Faculty Association*, 500 U.S. ___, 114 L. Ed. 2d 572, *reh'g denied*, 115 L. Ed. 2d 1044 (1991). Recently, PLF attorneys represented the appellants in *Keller v. State Bar of California*, 495 U.S. ___, 110 L. Ed. 2d 1 (1990) (limiting the integrated bar's ability to spend objecting members' dues for political activities). Additionally, PLF attorneys represent objecting students in *Smith v. Regents of University of California*, 2 Cal. App. 4th 750 (ongoing litigation challenging the political use of mandatory student fees; petition for review granted March 26, 1992). PLF believes the Second Circuit Court's opinion incorrectly analyzes the holdings of this Court which protect people from involuntarily subsidizing views they deplore through the collection of mandatory fees.

For the foregoing reasons, Pacific Legal Foundation and Averell Smith, *et al.*, request that the motion to file the amicus curiae brief which follows be granted.

DATED: June 10, 1992.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). The court held, *inter alia*, that mandatory student fees could be used to promote political and ideological views and activities with which they

disagree, so long as those views and activities occurred on the campus on which the fees were collected.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort, as to call for an exercise of this Court's power of supervision. Rule 10.1(c) includes as a ground for review when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court. All three of these grounds for review are present in this case.

I

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

The First Amendment protects more than the right to speak. It also protects the right to refrain from speaking, thereby ensuring that the choice to enter public dialogue at all remains in the hands of the individual rather than the state. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court recognized that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works

no less an infringement of their constitutional rights." *Id.* at 234 (footnote omitted). Therefore, compelled speech is as equally repugnant to the First Amendment as compelled silence. *See also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 782 (1988).

The Third and Fourth Circuit Courts of Appeals have both addressed the compulsion of financial support for political activities from students by public universities and come to the opposite conclusion than the Second Circuit. In *Galda v. Rutgers* (*Galda II*), 772 F.2d 1060 (3d Cir. 1985),[1] students challenged their state university's policy of funding the New Jersey Public Interest Research Group (NJPIRG), which (like the New York Public Interest Research Group (NYPIRG) organization at issue in *Carroll*) actively promoted a political and ideological philosophy with which the students disagreed.

The Third Circuit court held: "[B]ecause the educational component is only incidental to the organization's ideological objectives, the educational benefits are not adequate to overcome the constitutional objections." *Galda II*, 772 F.2d at 1061.[2] *Galda II* carefully analyzed the

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[1] The *Galda II* court states that it is not concerned with the question whether an organization with NJPIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views. However, the language in the opinion is directly applicable to this case and conflicts with the Second Circuit opinion.

[2] The Third Circuit first addressed the NJPIRG funding problem in *Galda v. Bloustein* (*Galda I*), 686 F.2d 159 (3d Cir. 1982). The court held that in contrast with the subsidized student newspapers and guest speaker programs upheld in *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); and

(Continued on following page)

alleged benefits students received by forced subsidization of NJPIRG. The educational benefits cited in *Galda II* track almost exactly those put forth in *Carroll*, 957 F.2d at 1000. In *Galda II*, the educational benefits included

> "learning to advocate and thoroughly learning their adversary's position in order to rebut them", forcing students to "publicly campaign and promote an organization", providing an opportunity "to investigate, research, write, and advocate their positions before governmental agencies," providing "students with leadership opportunities," and "teaching students to function as citizens."

Galda II, 772 F.2d at 1062. These "educational" interests are obviously applicable only to those students who actively participate in NJPIRG's ventures. Such participants are also, presumably, supporters of NJPIRG's messages and methods. Those students who do not support NJPIRG—those who are forced to contribute to it against

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Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), NJPIRG does not provide a "forum" for the expression of differing views. Rather, NJPIRG's political stance is determined by its student board of directors, and students working for NJPIRG are foreclosed from supporting contrary positions unless such support is "okayed by the state board." *Id.* at 165-66.

> Put simply, the educational component of PIRG cannot serve to obscure the underlying substance of plaintiff's complaint: that all [Rutgers] students were obliged to finance what allegedly amounted not to a "classroom" to foster the effective presentation of the students' views, but rather to fund a political entity devoted to the attainment of certain fixed ideological objectives.

Id. at 166.

their will—are not going to be active participants in NJPIRG. Therefore, this interest is inconsequential to student objectors.

Furthermore, the Third Circuit correctly noted that protecting dissenting students' rights has no adverse effect on the marketplace of ideas: A case to protect student's rights does not "present the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives." *Galda II*, 772 F.2d at 1064. The court noted that NJPIRG does not provide a forum for the expression of differing views but is a "group."

> The educational advantages described in the testimony do not differ from those that might be obtained by working with, or for, an independent organization such as the Republican or Democratic Party, or a clearly religious group which has undertaken an active and vigorous proselytizing program. As we have said, "it could not be seriously contended that student fees could be funnelled to such a group." Yet, the educational component that the University presents here as justification would be precisely the same were the recipient group one that clearly could not receive affirmative state support.

Id. at 1065 (citations omitted). The case at bar is indistinguishable from *Galda* in this respect. Moreover,

> [a]lthough the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the

> educational benefits are only "incidental"—arising from or accompanying the principal objectives—and subordinate to the group's function of promoting its political and ideological aims.

Id. at 1065. In *Galda II*, the University presented no evidence, nor did the court believe it could, that the educational experience which it cites as justification could not be gained by other means which do not infringe the students' constitutional rights. *Id.* at 1067. In this case the court specifically notes that students do obtain the same lessons as NYPIRG provides through the university's offer of classroom instruction specifically geared toward civic participation. *Carroll*, 957 F.2d at 1000.

The *Galda II* court concluded its analysis by noting that the objection to funding an outside entity through the "neutral funding" procedure by which all groups theoretically may be funded is that the result achieved is not neutral and does not achieve equal access. The process permits majoritarian groups to compel support from minorities in circumstances where no compelling state interest justifies the limitation on the First Amendment rights of minorities. *Id.* at 1067. Contrary to this language, the court below requires students with minority viewpoints to subsidize political activities with which they disagree.

The Fourth Circuit has addressed these issues from a different angle. In *Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864 (4th Cir. 1977), the court decided whether a university can forbid a recognized student organization (MaryPIRG) to use its share of the mandatory activities fees for litigation. The court held that the university *may* restrict the funds so that they may not be used for that purpose. *Id.* at 866. The university stated that it had restricted the funds because it "squared

with the University's obligation to all students: to expend funds only for educational purposes." *Id.* Litigation, it is implied, is not an educational purpose.

> There is no affirmative commandment upon the University to activate MaryPIRG's exercise of First Amendment guarantees; the only commandment is not to infringe their enjoyment. . . . In reality, the plaintiff [MaryPIRG] is asking the Board to finance the plaintiff's assertion of the Amendment. In this it cannot succeed.

Id. at 866. The court stated the university "may put the cost thereof upon those who exercise [First Amendment rights] rather than upon those who simply abide it." *Id.* Beyond this, to protect the First Amendment rights of students who disagree with the speech, the university *must* put the cost on those who *exercise* First Amendment speech rights, it *may* place the cost on those who *tolerate* the speech, but is *forbidden* to put the cost on those who *object* to the speech.[3] The Second Circuit's conflict with the decisions of this Court and of the Third and Fourth Circuits should be resolved before more students' rights

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[3] The Fourth Circuit also addressed the use of mandatory student fees to fund the student newspaper in *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983). This case is the sequel to *Arrington* (*see supra* Note 2), asking the court to review the challenge in light of *Abood v. Detroit Board of Education*, 431 U.S. 209. The *Kania* court distinguished *Abood* on its facts and decided that *Arrington* correctly held that student fees could be used for the student newspaper. The Fourth Circuit's focus is mistakenly on the differences between a union and a university, instead of on the similarities of the constitutional violations. This Court now has the opportunity to harmonize the union cases which protect dissenters' First Amendment rights, and the Second Circuit's opinion in this case, which requires students to subsidize political speech they abhor.

are violated. Therefore, this Court should grant review to consider and decide this important issue.

II

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF CERTAIN STATE SUPREME COURTS

Surprisingly, the issue now brought before this Court has only rarely been addressed by the highest courts of the states. This Court's decision in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), prompted students in Nebraska, Vermont, and Washington to challenge the use of their mandatory student activity fees for political purposes. The students met with defeat in the first two cases but won a partial victory in the third. In *Larson v. Board of Regents of the University of Nebraska*, 189 Neb. 688, 204 N.W.2d 568 (1973), the Nebraska Supreme Court held that despite the language in *Street*, mandatory student fees to support the campus newspaper, the student association, and a speaker's program did not violate the students' constitutional rights. The basis for the court's opinion was that the students did not prove only one political point of view was supported by such fees. *Id.* at 571.

In *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973), students complained of coerced subsidization of "radical" causes at the state university. The Vermont Supreme Court, also distinguishing the educational setting from the union situation in *Street*, held the students did not present a justiciable controversy because they did not plead and prove that they were unable to make their own views known on campus. Furthermore, the students did not prove they were denied equal and proportional

access to student association funds to present views with which they agreed. *Id.* at 479. Essentially, this ruling mirrors *Larson*.

In Washington, students at least found a court willing to accept that First Amendment rights were implicated. That state's Supreme Court addressed this issue in *Good v. Associated Students of the University of Washington*, 86 Wash. 2d 94, 542 P.2d 762 (1975). The students successfully challenged the university's allocation of mandatory student fees to a nonprofit corporation purporting to represent all university students and engaging in political and ideological activities with which the students disagreed. Although the students based their claim on *Street*, the Washington Supreme Court resolved the dispute on state statutory grounds. The court first noted that the nonprofit corporation was an agency of the university and subject to the ultimate control of the university's board of directors. *Id.* at 764. Therefore, the court held, students could be required to pay the fee unless the corporation exceeded the statutory purposes for which fees could be used or the corporation espoused only one particular political, social, economic, or religious viewpoint. *Id.* at 766, 769. Because the parties did not brief the issue of whether the corporation espoused only one viewpoint in the lower courts, the Supreme Court remanded for trial on that issue. *Id.* However, the Washington court did hold that the university could not compel all students to be members of the nonprofit corporation on the grounds that the students have a right *not* to associate.

> There is no room in the First Amendment for such absolute compulsory support, advocation and representation. We recognize that First Amendment rights are not absolute, but the university presents no arguments or facts to justify

> any exception, narrow as it would have to be, which might exist if a compelling state interest were presented.

Id. at 768.

These three cases were all brought in response to this Court's decision in *Street*. However, the language in that one case was apparently insufficient to instruct the state Supreme Courts in the proper response to the use of mandatory student fees for political purposes. Since *Street*, however, this Court has revisited the constitutional problems inherent in the collection of compelled dues several times. In *Abood*, *Ellis*, *Hudson*, *Keller*, and *Lehnert*, this Court has emphasized and reemphasized the constitutional infirmity of any state action that allows compelled fees to be used for political purposes. This Court has already specifically held that *teachers* cannot be forced to subsidize political activities with which they disagree. *Hudson*, 475 U.S. at 310; *Lehnert*, 114 L. Ed. 2d at 591. Certainly *students* must have the same constitutional rights. Therefore, this Court should grant review to guide state as well as federal courts in the proper application of constitutional principles to this issue.

III

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The Second Circuit's approach to this issue should be compared to how this Court has viewed the special nature of speech involving issues of public importance:

> By utilizing petitioners' funds for political lobbying and to garner the support of the public

> in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Lehnert, 114 L. Ed. 2d at 591 (opinion of Blackmun, J.) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)) (citations omitted). The only way to reconcile this language with the facts of the present case is to assume that college students have less First Amendment rights than the college professors in *Lehnert*. That assumption, however, must be wrong. *See Healy v. James*, 408 U.S. 169, 180 (1972).

The Second Circuit Court's opinion begins with the oft-quoted axiom by Thomas Jefferson: " '[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.' " *Carroll*, 957 F.2d at 992. This quotation provides the proper mind-set for determining compelled dues cases, and at least in part, the court below followed the dictates of that axiom. However, the Constitution not only forbids massive intrusions into the freedoms of speech and association, but minor ones as well. The Second Circuit has tried to appease both sides in this case by giving both the students and NYPIRG partial victories. In matters of such grave importance, though, this Court must not sanction anything less than the full vindication of the students' constitutional rights.

This case "pits students who object to bankrolling an organization whose political speech and activities they strongly oppose, against their university, whose considered educational judgment it is that students ought to support a wide variety of campus speech, civic activism, and extracurricular activities." *Carroll*, 957 F.2d at 995. The university may well have a compelling interest in *exposing* students to various conflicting viewpoints, but it has no compelling interest in coercing *support* for those viewpoints. The court below eloquently states the importance of maintaining one's own views, free from coercion of supporting opposing views:

> [T]he freedom to keep silent as well as to speak is grounded in something broader than a national fear of the state. It is equally the product of our view of personhood, which encompasses what the Supreme Court later referred to as "freedom of thought," "freedom of mind" and a "sphere of intellect and spirit." Were there no state at all, or were it inalterably benign, our conception of what it means to be human would still lead us to respect the individual autonomy of intellect and will enshrined in the First Amendment.

Carroll, 957 F.2d at 996 (citations omitted). The court below also quoted *Abood*, that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35.

In addition to this recital of the students' important speech rights, the court below bluntly states that NYPIRG engages in political speech which students are compelled to finance. *Carroll*, 957 F.2d at 997.

> [T]he transfer of funds hinges not on the ideological affinity between member and group, contributor and recipient, but rather on the compulsion inherent in conditioning registration, and hence matriculation and graduation, on payment of the fee. A student cannot pay the full fee without paying NYPIRG and he or she cannot continue as a student without paying the full fee. Whether justified or not, that is forced association and speech.

Id. The decision in this case should be easy, given the above statements. Unfortunately, the Second Circuit became bogged down in the university's excuses for consistently infringing on the students' rights.

The mandatory sponsorship of NYPIRG is intended to "expand campus speech by facilitating the activities of a wide variety of speakers." *Carroll*, 957 F.2d at 999. The court below wondered whether the mandatory fee is the least restrictive alternative. The court stressed the importance of academic freedom as a component of the First Amendment. *Id.* But what the First Amendment guarantees is the ability of scholars to research and speak unimpeded. This guarantee does not extend to forced subsidization of such research and speech.

The court below held that the three interests viewed together were sufficiently substantial to justify the infringement of the students' constitutional rights. *Carroll*, 957 F.2d at 1001. It also held that coerced contributions to NYPIRG were the least restrictive alternative to achieving those interests. *Id.* As will be shown, both the Second Circuit's premises and conclusion are wrong. The court below cites three distinct interests for SUNY-Albany's mandatory fee: (1) the general promotion of

extracurricular activities, (2) the facilitation of participatory civics training, and (3) the stimulation of robust debate on a variety of campus issues. *Carroll*, 957 F.2d at 999.

The first interest presents the most common argument made by universities: that the dissenters have the opportunity to fund groups that express their views using the mandatory fees. This remedy only compounds the constitutional problem. If this is the only recourse students have, then the only way students can mitigate the infringement of their First Amendment right not to finance an association they oppose is to increase their level of association.

The second interest applies only to those students who actively participate in NYPIRG's ventures. Those students who do not support NYPIRG's methods and causes will not participate in NYPIRG. Therefore, the students in this case gain nothing by the university's second advanced interest. The court below notes that SUNY-Albany also advances this interest by "offering courses in research, writing and government" and points out that NYPIRG "accomplish[es] substantially the same things" as the courses. *Carroll*, 957 F.2d at 1000. This sentence alone indicates that the coursework is a less restrictive alternative to compelled subsidization of NYPIRG.

The court below cites as the "most important" interest, *Carroll*, 957 F.2d at 1000, the stimulation of "uninhibited and vigorous discussion on matters of campus . . . concern." *Id.* The court suggests that without NYPIRG, the "college would be a very quiet, intellectually diminished and ultimately irrelevant place." *Id.* at 1001. The conclusion simply does not follow from the

premise. NYPIRG's activities may continue unabated without compelled student fees. The Second Circuit has allowed two issues to become intertwined, which confuses what is really a very straightforward problem. The question is *not* whether NYPIRG's speech activities will be permitted on the SUNY-Albany campus. The question is solely who will fund those activities. Because, as the court previously noted, compelled fees to fund these activities would be " 'sinful and tyrannical,' " *id.* at 992, NYPIRG may be funded only by those who do not object to that financial sponsorship.

Furthermore, forcing students to support collectively *one* point of view in representation of SUNY-Albany (through its connection to NYPIRG) does not advance the purpose of promoting debate, but frustrates it. The very purposes of compelling association in *Abood* (the need to avoid conflict and confusion that could arise if rival unions all clamored to the employers' and employees' ears, 431 U.S. at 224), and *Keller* (having more than one regulatory organization would leave attorneys unsure as to which is authoritative) are the same reasons association and speech financing should not be compelled in the university context. In regard to the funding of student political and ideological groups, students may be exposed to divergent opinion. But the university, let alone NYPIRG, is not creating a free marketplace or forum for the expression of ideas. It is requiring students to be the financial sponsors of someone else's speech. The system has nothing to do with a forum and it is certainly not free.

The court below adds as support for its position its opinion that a constant predictable flow of money to NYPIRG is an important facet of its existence, one worthy of receipt of compelled fees. Without NYPIRG, the court

frets, "students would cease to be linked by a common bond to the tolerant support of all points of view." *Carroll*, 957 F.2d at 1002. But it is precisely this state-ordered "bond" to "all points of view" that troubled Thomas Jefferson. Students should *not* be coerced to "tolerate," in the sense of financial subsidies, points of view repugnant to their own beliefs. If SUNY-Albany is truly concerned that students learn practical civics lessons, then the university would do well to let the NYPIRG supporters learn the art of inspiring voluntary donations, also known as fund raising. In real political campaigns, opponents to the message do not give money to the cause. Another message the Second Circuit and the university are delivering to students is that if you want to advance a political position and cannot find support for it, the government will simply give you the money to propagate your views. Moreover, SUNY-Albany and the court below have decided that the First Amendment has no application within the confines of a public university campus. Although the First Amendment must be honored in the workplace and in mandatory professional associations, the lesson here is that the First Amendment does not protect students. This is an illegitimate purpose for a public university.

The Second Circuit permits the coercion of fees from students to pay for viewpoints they abhor as expressed by NYPIRG, so long as "NYPIRG spend[s] as much money on activities at SUNY Albany as it takes in from SUNY Albany students via their activity fees." *Carroll*, 957 F.2d at 1002. "By allowing student money to finance NYPIRG at all we have already sanctioned a considerable infringement of [the students'] freedom from compelled speech." *Carroll*, 957 F.2d at 1002. This restriction in the

use of funds is meant to ensure that "objecting students like appellants contribute only to NYPIRG programs at SUNY Albany." *Id.* The constitutional distinction between on-campus and off-campus activities is nebulous at best, especially when the practical effect is to free up funds elsewhere for off-campus activities. No logical distinction can be drawn between coercing students to subsidize off-campus politicking and coercing students to subsidize on-campus politicking. The constitutional mandates in both cases are identical. It is little solace to objecting students that their mandatory fees will be spent on offensive messages in their own backyard as opposed to some other neighborhood.

The court below suggests that because the practice of using mandatory student fees to fund political activities is widespread, *Carroll*, 957 F.2d at 1002, this strengthens the state's interest against the students' constitutional claims. Far from strengthening the state's interest, this admission further illuminates the grave importance of this matter to students across the country. The number of students nationwide compelled to support speech which they deplore is inestimable. While amici appreciates the Second Circuit's reluctance to "micromanage the affairs of universities and their student organizations" *Carroll*, 957 F.2d at 1002, the court's mandate is to prevent any arm of the state (including a state university) from infringing on the rights of the citizenry. Reversal of the Second Circuit's opinion will not ban any type of speech from campus. It would not deny any group access and would not prevent any student from voluntarily supporting any message. What reversal *would* accomplish is the prevention of coerced subsidization of groups and speech

with which a student disagrees. This Court should act to protect their interests.

In response to *Abood*, *Ellis*, and *Hudson*, students at the University of California at Berkeley filed suit challenging the use of their mandatory student fees for political activities. In the *Smith* case, students are coerced to subsidize overtly political activities such as lobbying the state Legislature and state agencies on issues ranging from abortion funding to rent discrimination. The students have also involuntarily financially supported Amnesty International's campaign against political prisoners in Indonesia, support of gay and lesbian rights, gun control, the reelection of Congressman Ron Dellums, and a Berkeley marijuana initiative. The *Smith* plaintiffs abhor the fact that they are forced to financially assist the propagation of speech repugnant to their beliefs. By the time the case reached the California Supreme Court, *Keller* was pending before this Court. After *Keller* was decided, the state Supreme Court remanded the case back to the Court of Appeal for reconsideration in light of *Keller*. The Court of Appeal ignored the plain language of *Keller* and the apparent trend in the law to protect First Amendment rights of dissenters and determined that *Keller* had no effect whatsoever. The students appealed, and the case is again pending before the California Supreme Court. The outcome of this case will have a major effect on whether the students in *Smith* are vindicated as well as the SUNY-Albany students here.

CONCLUSION

The conflict presented by the decision of the Second Circuit Court of Appeals is clear and unmistakable. The Second Circuit has rejected the decisions of two other United States Circuit Courts of Appeals and one state Supreme Court. A similar case is currently pending before the California Supreme Court. Because the use of mandatory student fees for political purposes is so widespread, this Court may anticipate further challenges.

Like the students in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), who were required to do far more than be exposed to patriotism but support it with a raised hand, the students at SUNY-Albany have not simply been exposed to divergent views. They have been forced to reach into their pockets to support opponents' views. Ideas that could not win adherents through persuasion and reason are thus kept alive *by the state* through the imposition of fees on those that despise the ideal in question. Such an exercise of state power is the precise abuse that the First Amendment was designed to bring to an end.

Review by this Court is necessary to resolve the conflict created by the Second Circuit Court of Appeals' decision in this case and to bring students' constitutional rights in line with teachers, attorneys, nonunion workers, and other dissenting citizens. Amici curiae respectfully urge this Court to grant the petition for writ of certiorari

and reverse the portion of the judgment of the Second Circuit Court of Appeals which has been analyzed herein.

DATED: June, 1992.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS M. CARROLL, ROBERT J. CARROLL, MICHAEL E. McCHESNEY, EMANUEL J. PANOS, EDWARD J. PRIOLA, CRAIG J. RUCKER, ROBERT T. SCHMIDLIN, BETH TURKOVIC GARFUNKEL, CHRISTINE McCLELLAN, CHRISTOPHER SANDOR and SUSANNE ZIEGLER,

Petitioners,

vs.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, GEORGE L. COLLINS, JR., D. CLINTON DOMINICK, JUDITH LASHER DUKEN, ARNOLD B. GARDNER, GURSTON D. GOLDIN, JOHN L.S. HOLLOMAN, JR., NAN JOHNSON, EVERETTE JOSEPH, JUDITH DAVIDSON MOYERS, EDWARD V. MELE, VICTOR MARRER, ROSEMARY SALOMONE, EDGAR A. SANDMAN, THOMAS VAN ARSDALE, DARWIN R. WALES in their capacities as trustees of the State University of New York, JEROME KOMISAR, in his capacity as Acting Chancellor of the State University of New York, VINCENT O'LEARY, CLIFFORD D. CLARK, ALICE CHANDLER, in his or her capacity as President and chief administrative officer of, respectfully, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION

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Question Presented

Does a student activity fee regulation which promotes a university's substantial interest in providing its students extracurricular life, "participatory civics training" and energetic campus debate, which interest would be served less effectively absent the regulation, justify an objecting student's payment of a portion of that fee for the political speech of one of numerous recipients of the fee, chosen on a content-neutral basis, where the money is spent only on activities of the recipient which are germane to the university's educational interests?

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Petitioners,

VS.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, GEORGE L. COLLINS, JR., D. CLINTON DOMINICK, JUDITH LASHER DUKEN, ARNOLD B. GARDNER, GURSTON D. GOLDIN, JOHN L.S. HOLLOMAN, JR., NAN JOHNSON, EVERETTE JOSEPH, JUDITH DAVIDSON MOYERS, EDWARD V. MELE, VICTOR MARRER, ROSEMARY SALOMONE, EDGAR A. SANDMAN, THOMAS VAN ARSDALE, DARWIN R. WALES in their capacities as trustees of the State University of New York, JEROME KOMISAR, in his capacity as Acting Chancellor of the State University of New York, VINCENT O'LEARY, CLIFFORD D. CLARK, ALICE CHANDLER, in his or her capacity as President and chief administrative officer of, respectfully, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION

Respondents, Chairman and the individual Trustees of the State University of New York, its Chancellor and President at Albany (collectively "SUNY"), respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the circuit court correctly applied the decisions of this Court, the petition does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

Statement of the Case

A. The Student Activity Fee Regulation

It is part of the core purpose of a university to stimulate campus debate and the exchange of ideas (JA. 223)[1], and to enhance through extracurricular activities, the educational, social, cultural and recreational experiences of its students (JA.372-73). It was to further this purpose that the SUNY Board of Trustees adopted a regulation as amended in 1976, 8 N.Y.C.R.R. §302.14 (the "Regulation"), to establish a mechanism through which a broad range of extracurricular activities could be funded (JA.372-73).

The Regulation governs the imposition, collection and allocation of the Student Activity Fee at SUNY, including the Albany campus (JA. 563-66). Implementation of the Student Activity Fee is carried out by the campus president. § 302.14(c)(1) (JA.564).

The Regulation provides that prior to the close of the academic year 1976-77 and every four years thereafter, the student body at each SUNY campus "shall determine by referendum whether student activity programs shall be supported by either voluntary or mandatory fees." § 302.14(a) (JA. 563-64). This student referendum is binding (*Id.*).

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[1] Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix in the court below. Numbers in parentheses followed by the letter "a" refer to pages in the Appendix to the Petition.

If the students vote for mandatory fees, the representative student organization on each campus submits a proposed budget to the President, prior to registration each semester. The President either approves or disapproves the budget, a particular allocation, or any subsequent change in allocation. § 302.14(c)(1) (JA. 564).

This review is to ensure that the allocations comply with the prescribed criteria of the Regulation, which require that the allocations benefit the campus community and are used for, *inter alia*, "(i) programs of cultural and educational enrichment", or for "(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature." § 302.14(c)(3) (JA. 566)

Certification of the budget is the authorization needed to collect fees at registration. § 302.14(c)(1) (JA. 564). Failure to pay the fee may result in denial of registration. § 302.14(c)(2) (JA. 564).[2]

The Regulation is content-neutral. It does not authorize the President or his designee to base his or her decision upon the views or positions articulated by any particular student group (JA. 563-66). In fact, the Regulation requires that the representative student association fund student groups consistent with principles of equal opportunity. § 302.14(c)(1) (JA. 564).

B. Proceedings Below

Petitioners[3] commenced this action in the United States District Court for the Southern District of New York against

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[2] Under circumstances not relevant here, the fee may be waived or reduced, *e.g.*, when it might cause undue hardship. §302.14(c)(2) (JA. 565).

[3] Although the trial involved the injunctive claim of only one plaintiff, reference will be made to "petitioners" in the brief because the district court in its decision granted plaintiff's motion to add new plaintiffs.

SUNY and the New York Public Interest Research Group ("NYPIRG"). They sought to enjoin the allocation of a portion of SUNY's mandatory student activity fee to NYPIRG and to recover from NYPIRG that part of the fee paid over to it, because petitioners claimed application of the Regulation to NYPIRG compelled them to support the political positions advocated by NYPIRG, with which they disagreed, in violation of their First Amendment rights to speech and association.[4]

Because the district court had granted respondents' motion to dismiss the injunctive relief claims of all plaintiffs who had graduated from SUNY and to bifurcate the injunctive and damages claims, the trial was limited to Michael McChesney's injunctive claim against SUNY-Albany.

C. The Trial

1. Application Of The Regulation At SUNY-Albany

During the relevant time period, the students at SUNY-Albany voted to have a mandatory student activity fee (JA. 137, 142).[5] The fee at the time was $55.00 per semester and resulted in a student activity fee budget of over one million dollars (JA.463).

The determination and approval of the groups to receive funding is entirely content-neutral (JA. 146, 177). The only requirement for funding is that the group fall within the stated guidelines of the Regulation (JA. 146, 177, 183-85).

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[4] At the outset of the litigation, the court denied petitioners' motion for class certification. 99 F.R.D. 166 (S.D.N.Y. 1983). Consequently, the court dismissed as defendants four of the SUNY college presidents at campuses not attended by a named plaintiff. 575 F. Supp. 772 (S.D.N.Y. 1983).

[5] The relevant time period for the injunctive claim was Fall, 1986, when Michael McChesney became a student at SUNY-Albany, until the trial in October, 1989.

As a result of the application of the Regulation, over 100 diverse groups were funded at SUNY-Albany. For instance, the fee supported the Dance, Theater and New Arts Councils, the Albany State University Black Alliance ("ASUBA"), the Revisionist Zionist Alternative ("RZA"), Fuerza Latina, the Feminist Alliance, the Gay and Lesbian Alliance ("GALA"), the Student Association of the State University ("SASU"), a ski club, a geography club, intramural athletics and many more (JA. 613-62).

The student association funded NYPIRG at the rate of $3.00 per student, per semester. NYPIRG was not unique in this regard. SASU for example was funded on a per capita basis, and received a lump sum payment. And three funded groups, SASU, the United States Student Association ("USSA") and Amnesty International, like NYPIRG, are not based exclusively on campus, with Amnesty having its principal office off campus (JA. 637, 638, 659).

2. NYPIRG And Its Activities

During the relevant time period, President O'Leary approved the student association's budget, including the allocation to NYPIRG.[*] Central to his determination was that NYPIRG is educational and benefits the students at Albany, and thus meets the requirements of the Trustees' Regulation:

> [NYPIRG] provides an opportunity for our students to select issues, to do research on those issues, to articulate the bases of those issues, and to try to persuade people as to the worthiness of those issues.

(JA. 176).

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[*] Every two years, but prior to a final budget, the student association holds a referendum to make sure that the students want to fund NYPIRG. This referendum is not provided for in the Regulation and is advisory only (JA. 143, 144). In addition to NYPIRG, SASU and USSA are also subject to an advisory referendum on their funding (JA. 469).

The evidence showed that the Albany chapter of NYPIRG organized speeches, sponsored debates and public forums on many public issues. For example, the Chapter sponsored a forum on recycling, a professors' forum on the arms race, a symposium on women's health care, and a debate between representatives of presidential campaigns. Hundreds of students participated in these events (JA. 520-21, 317-18, 1295-1321, 1324-37).

NYPIRG also provided students with the opportunity to participate in civic training through, for example, its lobbying activities and legislative internships (JA. 180, 446-53). A NYPIRG legislative internship involves regular workshops, an intensive two-week training program, a legislative conference, actual lobbying in the New York State Legislature, research and writing. Legislative interns also participate in the "lobby game" a simulated Legislature, where the students play different constituent groups and practice media and advocacy skills (JA. 1347-74).

President O'Leary testified that students participating in NYPIRG are the ones who adopt the side they will take on a given issue. Their choice of "side" is their own, not predetermined by someone else (JA. 180). By learning about the political process, students enjoy "an opportunity of participating in the most fundamental aspects of a democratic society" (21a).

D. The Decisions Below

On July 30, 1991, the district court denied petitioners' claim for injunctive relief and dismissed the complaint. The court found that SUNY-Albany, through its student activity fee policy, funds an array of diverse groups, thus providing a forum for public discussion and debate. The university's creation of such a forum, which is content-neutral, is itself an interest protected by the First Amendment. *Carroll v. Blinken*, 768 F. Supp. 1030 (S.D.N.Y. 1991) (JA. 128).

Having found that SUNY has a protected interest in providing the students with a content-neutral public forum, the court balanced this interest against petitioners' First Amendment

claim. The court determined that SUNY-Albany's funding of NYPIRG through the allocation to it of $3.00 from petitioners' mandatory student activity fee, did not impermissibly infringe upon petitioners' First Amendment rights because there was no close association between petitioners and the political speech with which they disagreed (JA. 129). Since the petitioners' fee supported an array of student groups, the court held that the connection between petitioners and the view of any group or organization funded by the fee was attenuated. Thus the court concluded that no close association existed between petitioners and NYPIRG and petitioners' First Amendment rights were not violated (JA. 132).

On appeal, the court preliminarily determined that compelled payment of a part of the mandatory student activity fee to NYPIRG, in order to continue as a student at SUNY-Albany, violated petitioners' rights to be free from compelled speech and association, because the automatic membership[7] and the compelled payment of funds "hinges not on the ideological affinity between member and group, contributor and recipient, but rather on the compulsion inherent in conditioning registration, and hence matriculation and graduation on payment of the fee." *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) (14a).

The court, however, unanimously upheld the Regulation as applied to NYPIRG because it said that these intrusions were justified. A regulation which is content-neutral will withstand scrutiny if it promotes a substantial governmental interest which would be achieved less effectively absent the regulation (18a).

The court found that the student activity fee is content-neutral. It is not intended to restrict free speech; to the contrary, "it seeks to expand campus speech by facilitating the activities of a wide variety of speakers" (18a). The court also found the

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[7] NYPIRG's By-Laws provided *inter alia* that any fee paying student is automatically a member of NYPIRG (27a). On April 11, 1992, NYPIRG amended its By-Laws to delete the provision providing for automatic membership, and therefore, it is not an issue for review.

funding provision to be content-neutral because it does not grant or withhold funds based on the content of the recipients' speech (*Id.*).

The court found that the Regulation also promotes substantial interests of the university, specifically (1) the general promotion of extracurricular activities, (2) the facilitation of skills and civic duty and (3) the stimulation of robust campus debate on a variety of public issues (19a).[8] The court held that these interests together are substantial enough to justify the infringement that occurs when Albany transfers a portion of the activity fee to NYPIRG (23a).

The court also held that the use of a mandatory fee as a means of encouraging campus debate is the practice of universities and colleges throughout the country, and that these interests would be served less effectively absent the activity fee regulation. The court recognized that the ability of NYPIRG and other groups to function effectively requires that it have adequate resources upon which it can depend for stability. Moreover, the court stated, the mandatory fee shows the University is committed to the goals of enriching campus life and promoting debate (24a).

The court thus concluded that a state university may constitutionally allocate a student's activity fees to a group with whose speech some students disagree as long as the organization spends the equivalent of the students' contributions for the benefit of the campus, and does not define its membership to include all fee paying students (28a).

The court affirmed the district court's order upholding application of the Regulation to NYPIRG, reversed in part, and remanded the case to the district court with instructions to fashion as unintrusively as possible, procedures to ensure that NYPIRG spend as much at SUNY-Albany as it receives from Albany students' fees and to eliminate NYPIRG's automatic membership scheme (28a).[9]

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[8] The court noted that in scrutinizing the University's interests in funding NYPIRG with student activity fees, it accorded "wide latitude to universities to define and carry out their educational mission" (18a).

[9] No judgment as to this procedure has yet been entered by the district court.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals' Decision Is Consistent With Decisions Of This Court

The court of appeals' decision that application of the Student Activity Fee Regulation to NYPIRG satisfies the First Amendment is in accord with decisions of this Court. Application of a content-neutral regulation which burdens speech satisfies the First Amendment if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989).

There can be no serious dispute that the Regulation is content-neutral. On its face it does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not authorize university officials to administer the Regulation on the basis of such constitutionally impermissible criteria. The only requirement for funding is that the group fall within the facially neutral guidelines of the Regulation. Indeed as the court below found, the Regulation seeks to expand, rather than restrict speech (18a).

SUNY's interest in application of its content-neutral Regulation to NYPIRG is substantial. It is part of the educational mission of a university to create a forum to stimulate vigorous debate and discussion of ideas. To further this purpose, the SUNY Board of Trustees adopted the Regulation to establish a mechanism through which a broad range of extracurricular activities could be funded. As former Chancellor of SUNY, Clifton Wharton testified:

> The basic philosophy of an educational experience in any institution ... is to provide for a student as wide a range of opportunities and exposures which will allow for the development of the potentials of an entire individual. In many cases [a student's goals of] self-fulfillment, self-development and self-improvement ... are only partially met through

> formal classroom education. Therefore, on all campuses I am familiar with, you have a wide range of student activities that are available on campus.

(JA. 372-73).

The court of appeals held that SUNY created such a forum through its mandatory student activity fee and thus had a substantial interest in its Regulation. First, and perhaps most important is its interest in stimulating uninhibited and vigorous discussion on matters of campus and public concern. This interest is hardly unique to SUNY-Albany, but is a universal interest of universities which are "peculiarly the marketplace of ideas". *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967). Second, is SUNY's interest in the general promotion of extracurricular activities. The funding of a multitude of diverse groups including the $3.00 allocation to NYPIRG is consistent with the philosophy that education of students extends beyond the classroom and is consistent with the university's desire to enrich the overall extracurricular lives of the students.[10] Third, SUNY has an interest in the facilitation of educational skills and civic duty through hands-on involvement in the political process. As the court of appeals recognized, these interests together are substantial. In holding that SUNY's interests in its Regulation as applied to NYPIRG are substantial, the court of appeals simply applied well-established principles. *See Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J. concurring) (university "atmosphere" includes extracurricular activities, "critical aspect[s] of campus life"); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. at 603 (The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas); *Kania v. Fordham*, 702 F.2d 475, 480

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[10] Petitioners' attempt to distinguish between use of tuition to subsidize education in the classroom and use of mandatory fees for extracurricular "education" is unsupportable. It is a distinction without a difference and points up only a difference in educational philosophy, a philosophy for which SUNY is entitled to deference. Moreover, if petitioners' argument were to prevail it would mean that *no* extracurricular activities would be funded through a student activity fee.

(4th Cir. 1983); *Arrington v. Taylor*, 380 F. Supp. 1348, 1363 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D. Neb.), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

Petitioners argue, however, that the Second Circuit's decision is erroneous in light of this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and its progeny (hereinafter "*Abood*"), because it failed to identify a "compelling" state interest to justify the infringement. Petitioners misconstrue the standard set forth in those cases. *Abood* does not require a showing of a compelling state interest. In fact, each case seems to use different terminology. For example, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 233 (1956), talks about a "legitimate" interest in labor peace, whereas *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 456 (1984), *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), and *Lehnert v. Ferris Faculty Assoc.*, 111 S. Ct. 1950, 1960 (1991) hold that the activities must be justified by a "governmental interest" a "state interest" or a "legitimate governmental interest" respectively. None of these cases refers to a compelling state interest.[11]

In any event, SUNY's interest is compelling. The very core purpose of the First Amendment is to foster the robust and unfettered exchange of ideas. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (the first amendment expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open"); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Here, SUNY has adopted a Regulation which creates an equal-access forum to stimulate robust and unfettered debate through the funding of over 100 diverse groups. If *Abood* requires a compelling interest, and

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[11] *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.11 (1986), a union case, cites to non-union cases which applied a compelling interest standard. However, as with the other cases cited above, *Chicago Teachers* refers only to the "government interest" in labor peace. 475 U.S. at 302.

labor peace is the interest there, the creation of a content-neutral equal-access forum, which itself is a protected interest, is an equally if not more compelling interest which outweighs petitioners' rights to be free of compelled speech. *See Burson v. Freeman*, 60 U.S.L.W. 4393, 4399 (U.S. May 26, 1992) (No. 90-1056) (where fundamental rights conflict, restriction on speech is on the constitutional side of the line).

The court of appeals also found that SUNY's substantial interests would "be achieved less effectively absent the regulation". *United States v. Albertini*, 472 U.S. at 689. Petitioners contend, however, that SUNY could meet its goals without mandatory funding through the many non-student fee funded organizations which provide similar activities, and thus the funding scheme is not a "narrowly tailored" intrusion. This argument attempts to create the fiction that the funding is thus voluntarily given, when in fact, it would require the University to use student moneys from tuition, wholly or in part, to support the arrangement. This contention also ignores the fact that a consequence of tailoring the forum to each student's preference would undermine the system and jeopardize the university's ability to maintain an equal-access educational forum. As the court of appeals recognized, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can obtain in support of their activities. The fee scheme provides stability and predictability so that established groups can estimate with some accuracy their annual funding. Moreover, an alternate funding scheme "would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view" (24a).

Although the court of appeals applied the correct "less effective" standard, it was mindful of the need to ensure that even incidental burdens on speech be "narrowly tailored", and therefore, it went a step further and held that funding of

NYPIRG must be limited to activities germane to SUNY's substantial educational interests.[12]

Petitioners misinterpret the decision below when they say that the First Amendment infringement is not cured by limiting the use of fees to NYPIRG's activities which are germane, *i.e.*, for the benefit of the students at Albany. To the extent the court of appeals put limits on NYPIRG's use of fees, it was not because it believed SUNY did not have a substantial interest justifying the infringement, but because it found those excluded activities were not germane to SUNY's substantial educational interests in its Regulation and in funding NYPIRG. By excluding those activities not germane to SUNY's interests, the court of appeals merely applied the teaching of *Abood* which requires that funded activities be germane to the interest to justify a First Amendment infringement.[13]

As both the district court and court of appeals found, those activities of NYPIRG which benefit the students at Albany are germane to the substantial interest SUNY has in funding NYPIRG as part of the forum. NYPIRG teaches concrete skills - research, speaking, writing, and advocacy. Participating students in each area learn about their chosen project, prepare reports, memoranda and press releases, practice public survey techniques, involve themselves in community service efforts, obtain experience in public speaking, sponsor debates and communicate with their legislative representatives. NYPIRG also instills in students a sense of civic activism and responsibility.

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[12] Petitioners' contention concerning the remedy is premature. The court of appeals remanded to the district court to fashion as unintrusively as possible a mechanism to ensure only activities germane to SUNY's interests were funded by the Student Activity Fee. This mechanism has not yet been determined and thus there is no issue for review by this Court.

[13] Petitioners suggest that this case "presents an opportunity for the Court" to apply the teachings of *Abood* "in the important realm of education" (Pet. Br. at 15). However, the court of appeals easily applied the germaneness test of *Abood* to SUNY in this case. Thus, this is not a novel question meriting review by this Court.

Thus the court of appeals concluded:

> A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place.

(22a). SUNY's determination that including NYPIRG as part of the forum serves the educational purpose of the forum is entitled to deference. This court has consistently held that universities should be accorded wide latitude to define and carry out their own educational missions. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

2. The Court of Appeals' Decision Does Not Conflict With The Third Circuit Decision In *Galda v. Rutgers*

Although the Third Circuit held unconstitutional the payment of a mandatory fee to NJPIRG at Rutgers in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), there is no conflict in the decisions because *Galda* is factually distinguishable. At Rutgers, the students paid a separate and distinct student activity fee to NJPIRG, because it was an organization independent of the university and thus ineligible to receive money from the general student activities fee. The NJPIRG fee was even a separate line item on the student's tuition bill. Unlike at SUNY-Albany, the students paid a fee to only one group - NJPIRG - and not to fund a forum. The Third Circuit noted there is a distinction between PIRG and student organizations funded through the general fee. The general fee is used to subsidize a variety of student groups and therefore a "forum" for a diverse range of opinion, whereas PIRG

itself is not a forum for the expression of different views. 772 F.2d at 1064. Here the fee is used to fund an equal-access forum of over 100 diverse groups including NYPIRG. Thus, the very basis for the Second Circuit's decision was missing in *Galda*. Indeed the Third Circuit recognized the distinction between the cases, because it expressly left open the question raised here, "whether an organization with PIRG's philosophic outlook may be funded through the general activities fee as are other campus organizations representing diverse views." 772 F.2d at 1064. Accordingly, there is no conflict which requires resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 15, 1992

Respectfully submitted,

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(4)

No. 91-1831

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS W. CARROLL, ROBERT J. CARROLL, MICHAEL E. McCHESNEY, EMANUEL J. PANOS, EDWARD J. PRIOLA, CRAIG J. RUCKER, ROBERT T. SCHMIDLIN, BETH TURKOVIC GARFUNKEL, CHRISTINE McCLELLAN, CHRISTOPHER SANDOR and SUSANNE ZIEGLER,

Petitioners,

vs.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York,

Respondents.

(For Full Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

QUESTIONS PRESENTED

1. Does the State University of New York at Albany ("SUNY Albany") violate the First Amendment to the United States Constitution by applying a content-neutral, student activity fee regulation to fund numerous and diverse student groups, when one of the student groups, which is funded because of its educational value, engages in speech with which some students disagree?

2. Was the Court of Appeals correct in finding that any minimal intrusion on First Amendment rights is more than justified by SUNY Albany's interests in enriching students' educational opportunities and stimulating energetic campus debate, provided that the student groups at SUNY Albany use the student activity fees for the benefit of SUNY Albany students?

PARTIES TO THE PROCEEDING

The petitioners, who were plaintiffs in the district court and appellants in the Court of Appeals are: Thomas W. Carroll, Robert J. Carroll, Michael E. McChesney, Emanuel J. Panos, Edward J. Priola, Craig J. Rucker, Robert T. Schmidlin, Beth Turkovic Garfunkel, Christine McClellan, Christopher Sandor and Susanne Ziegler.[1]

The respondents, who were defendants in the district court and appellees in the Court of Appeals are: Donald M. Blinken, in his capacity as Chairman of the Board of Trustees of the State University of New York, George L. Collins, Jr., D. Clinton Dominick, Judith Lasher Duken, Arnold B. Gardner, Gurston D. Goldin, John L.S. Holloman, Jr., Nan Johnson, Everette Joseph, Judith Davidson Moyers, Edward V. Mele, Victor Marrero, Rosemary Salomone, Edgar A. Sandman, Thomas Van Arsdale, and Darwin R. Wales, in their respective capacities as trustees of the State University of New York, Jerome Komisar, in his capacity as Acting Chancellor of the State University of New York, Vincent O'Leary, Clifford D. Clark, and Alice Chandler, in his or her capacity as President and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State

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1. This Court does not have jurisdiction over the claims of any of the petitioners, except Thomas W. Carroll ("Carroll"), because the Notice of Appeal (the "Notice") only named Carroll in either the caption or the text of the Notice. Carroll's injunctive relief claims had been dismissed earlier in the case by the district court as moot, which dismissal was never appealed. Thus, the Notice is defective as to all other petitioners, including the only plaintiffs with injunctive relief claims, because it fails to comply with the jurisdictional requirements of Fed. R. App. P. 3(c). *See, e.g., Torres v. Oakland Scavengers Co.*, 487 U.S. 312, 318 (1988).

University of New York at New Paltz, and New York Public Interest Research Group, Inc.[2]

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2. New York Public Interest Research Group, Inc. has no parent company and no subsidiaries.

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No. 91-1831

In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.* and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENT NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is an action by eleven former and current students ("plaintiffs" or "petitioners") who challenge as unconstitutional the allocation to New York Public Interest Research Group,

Inc. ("NYPIRG") of a portion of the mandatory student activity fees paid by all students at three campuses of the State University of New York ("SUNY" or the "University").[3] Plaintiffs contend that the allocation to NYPIRG violates their First Amendment rights because they disagree with some of NYPIRG's views and activities.

Pursuant to New York State Education Law, Section 355, the SUNY Board of Trustees adopted a regulation as amended in 1976, 8 N.Y.C.R.R. § 302.14 (the "Regulation"), which governs the imposition, collection and allocation of the student activity fee at SUNY, including the SUNY Albany campus. The Regulation establishes a mechanism through which a broad range of extracurricular activities enhancing the educational, cultural, social and recreational experiences of the SUNY student population can be funded (App. 5D).[4] Under the Regulation, all allocations which are included in the student activity fee budget must benefit the campus community and be consistent with one of eleven criteria (App. 5C).

The Regulation is content-neutral (App. 18A), and plaintiffs do not claim otherwise. The student activity fee at SUNY Albany is used to fund approximately 100 student groups on a non-discriminatory basis. Through this funding SUNY Albany has created a diverse forum for "uninhibited and vigorous discussion on matters of campus and public concern"

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3. The complaint sought a permanent injunction, declaratory judgment and damages. Prior to trial, the district court dismissed the injunctive relief claims of all plaintiffs who had graduated from SUNY for lack of standing and bifurcated the trial so that the remaining injunctive relief claims, those as to SUNY Albany, would be tried first.

4. The decision of the district court is reproduced in Appendix D. Page references are to the Appendix.

(App. 21A). The creation of a forum on campus is part of the University's educational mission (App. 21A-22A, 10D).

Any student group is eligible for funding if the SUNY Albany Student Association determines, with required approval by SUNY Albany's President, that the student group meets the criteria set forth in the Regulation (App. 5A). SUNY Albany's funding of NYPIRG complies with the Regulation because NYPIRG provides substantial educational benefits to students at SUNY Albany (App. 20A-21A, 9D), and thus satisfies the sixth criterion of the Regulation as a recognized student organization whose "purpose and activities . . . are of [an] educational, cultural, recreational or social nature" (App. 5A). Among other things, NYPIRG's educational value includes teaching students concrete skills, such as research, public speaking, writing, negotiation, organization and advocacy and providing a "hands-on civics exercise" (App. 20A-21A; *see* 8D). In addition, SUNY Albany awards academic credit for students who participate in internships with NYPIRG (App. 8A).

NYPIRG is a student run, not-for-profit organization, whose board of directors (the "Board") is composed solely of students elected annually by all of the students at each of the 17 schools in New York State with a NYPIRG chapter (App. 6A, 6D). Each of those schools has at least one representative on the Board. The Board approves project proposals and annually selects the projects and issues on which NYPIRG will work both statewide and on local campus chapters (App. 7D). Any student may submit a proposal to NYPIRG's Board and, thus, it is the students who choose the projects and issues NYPIRG works on (App. 7D).

NYPIRG's paid staff, which is under the control of the student Board, provides students with experienced supervision and direct skills training, such as workshops on writing and public speaking. Contrary to plaintiffs' assertions, most of the

paid staff of approximately 65 individuals statewide are involved in supervising and teaching students who are active in NYPIRG either on campus or in NYPIRG's legislative internship program or are involved in administering NYPIRG's New York office in order to ensure that the NYPIRG campus chapters receive the benefits of being part of a statewide organization[5] (App. 8D, 14D). The testimony at trial was uncontradicted that NYPIRG employs no full-time paid lobbyists and that only a small number of staff members ever lobby, and then only rarely.[6] NYPIRG hires a full-time project coordinator at each campus chapter, including SUNY Albany, to assist students in developing research, writing, and public speaking skills. NYPIRG hires executive staff responsible for the supervision and training of the full-time project coordinators.

NYPIRG's focus is, and always has been, the campuses and most of NYPIRG's activities take place there. NYPIRG's activities are non-partisan and NYPIRG does not endorse or support campaigns for elective office (App. 6D). The campus chapter at SUNY Albany organizes numerous speeches, debates, public forums and film/discussion events on a host of public issues. The work of NYPIRG's campus chapter at SUNY Albany has contributed to the diversity and breadth of views aired on the SUNY Albany campus.

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5. Although plaintiffs state that NYPIRG is the only funded student group which has its principal office off-campus, at least one other funded student group, Amnesty International, has its principal office off the SUNY Albany campus.

6. In any event, whether staff members lobby is irrelevant because to the extent NYPIRG expends funds on activities which do not involve SUNY Albany students, the Court of Appeals ruled in plaintiffs' favor that these funds may not come from SUNY Albany student fees (App. 24A-26A).

Despite plaintiffs' attempts to portray it otherwise, NYPIRG is not unique among funded organizations at SUNY Albany. First, NYPIRG is funded, as are all other student groups, only after both the SUNY Albany Student Association and the SUNY Albany President determine that it meets the criteria set forth in the Regulation. Further, NYPIRG is not the only group which is funded on a per capita basis, whose budget is not itemized or whose funding is subject to a separate advisory referendum.

During the relevant period, 1986-1989, the SUNY Albany Student Association approved an average allocation to NYPIRG of approximately $57,000 per year, out of a student activity fee budget of approximately one million dollars per year. This money is spent on the training students involved with NYPIRG at SUNY Albany receive and on the many activities and projects on which the students participate and work.[7]

Student activity fees make up 30 percent of NYPIRG's budget (App. 8D-9D). Thus, NYPIRG extensively supplements this funding from other sources and expends more on behalf of students enrolled at the campuses on which NYPIRG is located, including SUNY Albany, than the amount of NYPIRG's budget allocation from those campuses.

After a bench trial, the district court rejected plaintiffs' claims holding that plaintiffs had not established that their First Amendment rights had been infringed (App. 15D). The

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7. Petitioners attempt to portray NYPIRG as having limited participation by students at SUNY Albany (Petition for Writ of Certiorari ("petition") at 5 n.5). However, the testimony was undisputed that, in addition to the 40 students who run the campus chapter, many more, up to a couple of hundred, attend each NYPIRG meeting and each forum, debate and movie NYPIRG sponsors.

district court found as a fact that NYPIRG's activities do provide a substantial educational benefit to students at SUNY Albany and concluded that SUNY Albany's exercise of academic freedom was itself protected by the First Amendment (App. 8D-10D). The district court found that "the activity fee funds a forum created for the purpose of fostering the expression of diverse views through a wide range of groups" and "is being used by SUNY Albany precisely to further the University's core educational purpose of maintaining a broad extracurricular program and an open forum for discussion and debate" (App. 13D-14D). Further, the district court held that, because plaintiffs do not pay any fee directly to NYPIRG and because the fee they do pay is used to fund a large number of diverse groups, plaintiffs had not established their claims of compelled speech or association (App. 12D).

The Court of Appeals held that plaintiffs' First Amendment right against compelled speech suffers when NYPIRG uses student funds (App. 15A), but that the infringement is justified by various educational interests of the University (App. 23A). Specifically, the court noted SUNY Albany's substantial interest in promoting "a rich extracurricular life for its students," in teaching "specific, concrete skills -- research, speaking, writing, organization and advocacy," and in stimulating "uninhibited and vigorous discussion on matters of campus and public concern" (App. 19A-21A). Moreover, the court found that "these interests would be served less effectively absent the activity fee distribution regulation" (App. 23A).

However, the Court of Appeals further ruled that SUNY Albany's interests would not justify the use of SUNY Albany students' money for any NYPIRG expenditures that

were unrelated to benefiting SUNY Albany students[8] (App. 24A-26A). Consequently, the court remanded the case to the district court to fashion procedures "requiring NYPIRG to confirm in the Albany Student Association budgetary process that it spends at SUNY Albany the equivalent of Albany students' activity fee contribution" (App. 26A). The district court has not yet determined what procedures are required.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF ACADEMIC FREEDOM IN UPHOLDING THE STATE UNIVERSITY'S CONTENT-NEUTRAL STUDENT ACTIVITY FUNDING REGULATION

The petition's finespun arguments unwind because they misconceive one bedrock principle of First Amendment jurisprudence: academic freedom. Plaintiffs disagree with the factual findings of the courts below that NYPIRG has educational value to students and that SUNY Albany has educational policy reasons for permitting NYPIRG to be funded along with other groups. However, those findings,

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8. The Court of Appeals also held that the automatic membership provision of NYPIRG's by-laws, pursuant to which all students who paid the student activity fee were members of NYPIRG, served no substantial SUNY Albany interest and impermissibly infringed the students' right to be free from compelled association. Because this issue was decided by the Court of Appeals in plaintiffs' favor, it is not before this Court. Additionally, on April 11, 1992, in response to the Court of Appeals' decision, NYPIRG amended its by-laws to eliminate the automatic membership provision.

which are not challenged as clearly erroneous, significantly deflate plaintiffs' arguments that this case warrants this Court's granting of the petition.

Indeed, the petition is little more than a garden-variety objection to a student activity regulation. Plaintiffs' objection to NYPIRG's funding is indistinguishable from objections that each and every SUNY Albany student may have to one or another student group. Moreover, plaintiffs' theory invites the federal courts, rather than college administrators, to determine which student groups and activities are entitled to funding and which are not. Thus, plaintiffs seek relief which would threaten both to chill the free speech rights of students participating in student activities and to undermine the University's right to structure a diverse extracurricular program and an open forum for robust debate.

The unanimous opinion of the Court of Appeals upholds the Regulation by applying basic First Amendment principles that are not in doubt, while giving due deference to the educational judgments of SUNY Albany's administrators. Further, while the Court of Appeals eschewed intermeddling in university affairs, it did accord plaintiffs the narrowly circumscribed right to challenge the allocation of student activity fees to the extent the fees are alleged to be used for a purpose unrelated to benefiting students at SUNY Albany.

SUNY Albany exercised its educational judgment in deciding to permit funding of NYPIRG out of student activity fees. Accordingly, the Court of Appeals properly considered the long line of this Court's precedents which recognize the academic freedom of a university and the wide latitude that must be accorded to a university in pursuing its educational mission (App. 18A-19A). *See Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985) (deference to university required because of responsibility under First Amendment to safeguard academic freedom); *Regents of the*

Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (First Amendment guarantee of academic freedom leaves university free to make its own judgments as to education); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is a special concern of the First Amendment).

As the Court of Appeals also recognized, SUNY Albany's determination to foster extracurricular activities as part of its educational program is entitled to broad deference.[9] *See* App. 20A, *citing Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb. 1973), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). Academic freedom clearly extends to promoting education outside the confines of the classroom[10] (App. 20A). *See Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring) ("it is clear that the 'atmosphere' of a university includes such a critical aspect of campus life" as extracurricular activities).

Furthermore, college campuses are peculiarly the "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180

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9. Plaintiffs' educational claims are anachronistic and based on the narrow notion that the proper function of public education begins at the blackboard and ends at the classroom door. They reject the idea that a state university has any interest in promoting educational activities that are not listed in the course catalog. In fact, because the result of the activity funding is that plaintiffs pay for one group with which they disagree, they are willing to eliminate the funding of all student groups. *See* Petition at 20, 24.

10. While petitioners rely on *Board of Education v. Pico*, 457 U.S. 853 (1982) for the proposition that extracurricular activities are not within the same discretion of educators as are classroom activities, they ignore that in *Pico* the plaintiffs had conceded that if the decision to remove books from the school library was solely educational, instead of content based, the decision would have been permissible. *Id.* at 870-72.

(1972). The student activity fee creates a forum at SUNY Albany by funding nearly 100 diverse groups[11] (App. 21A, 10D). Determining which groups should be part of this forum and which provide educational benefits to the students are decisions "best left to administrators and trustees with expertise in designing college and university curriculum and extra-curricular activities" (App. 10D). *See Ewing*, 474 U.S. at 226; *Galda v. Bloustein*, 686 F.2d 159, 166 (3d Cir. 1982) ("*Galda I*") (noting that "[a]lthough many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment").

Finally, the establishment of the forum, which is accessible to any student group without governmental review of the content of the group's functions and activities, is itself subject to First Amendment protection (App. 18A, 10D). *See also Widmar*, 454 U.S. at 267-68, 277. Once a university creates an open forum, the Constitution forbids the university from enforcing discriminatory, content based exclusions. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Widmar*, 454 U.S. at 267-68. To deny funding to NYPIRG because certain students disagree with its views would effectively exclude NYPIRG from the forum and would stand the First Amendment on its head.

For all these reasons, the Court of Appeals properly weighed plaintiffs' right to be free from compelled speech

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11. The core purpose of the First Amendment is to foster the robust and unfettered exchange of ideas. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). This purpose is furthered by the creation of a forum at SUNY Albany through the funding of these diverse groups (App. 9D-10D).

against the First Amendment rights of SUNY Albany in academic freedom and of NYPIRG in non-discriminatory access to the University forum, and correctly concluded that the Regulation permitting the funding of NYPIRG at SUNY Albany is constitutional.

II.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS

In reviewing whether the allocation to NYPIRG of a portion of the mandatory student activity fees collected at SUNY Albany intruded on petitioners' First Amendment rights, the Court of Appeals applied *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Lehnert v. Ferris Faculty Ass'n*, _ U.S. _, 111 S. Ct. 1950 (1991).[12] The Court of Appeals found a First Amendment intrusion, but determined that it was justified by SUNY

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12. Respondent NYPIRG does not agree that *Abood* and its progeny should apply to this case both for the reasons stated in Point I above and because those precedents on their face do not apply where a university compels the payment of a student activity fee which it allocates to nearly 100 diverse student groups on a content-neutral basis in order to create a forum.

Albany's interests in enhancing the educational quality of the University.[13]

Plaintiffs suggest that in *Abood* and its progeny this Court required that the state demonstrate a compelling state interest in the regulations at issue, but that suggestion is mistaken. *See, e.g., Lehnert*, 111 S. Ct. at 1959; *Keller*, 496 U.S. at 13-14; *Abood*, 431 U.S. at 225, 232. This Court has not applied the compelling state interest standard to forced funding cases.

The Court of Appeals correctly followed this Court's prior decisions holding that where a regulation affecting speech is content-neutral, the state must show a substantial state interest which would be achieved less effectively absent the regulation.[14] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 & n.6 (1989); *United States v. Albertini*, 472 U.S. 675, 687-89 (1985). A regulation is "content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (quoting *Clark v.*

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13. The points as to which the Court of Appeals found insufficient justification -- NYPIRG's spending which did not benefit SUNY Albany students and its automatic membership by-law provision -- were decided in petitioners' favor and are not before this Court.

14. The compelling state interest standard, urged on this Court by petitioners, is applied by this Court only where it finds a regulation of speech is content based, unlike the Regulation at issue here. *See, e.g., Burson v. Freeman*, _ U.S. _, 60 U.S.L.W. 4393, 4395 (U.S. May 26, 1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, _ U.S. _, 112 S. Ct. 501, 508-09 (1991). The least restrictive means test is similarly inappropriate for content-neutral regulations. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989).

Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis deleted). As the Court of Appeals found, the Regulation is content-neutral because it "does not grant or withhold funds based on the content of the recipient's speech" (App. 18A). Thus, the Court of Appeals properly determined that the funding of NYPIRG was constitutional if the state had a substantial interest which would be achieved less effectively absent the Regulation (App. 18A). This test is especially appropriate here where the Regulation seeks to expand speech and the University's own First Amendment interests are at stake.

The Court of Appeals found three substantial state interests which justified SUNY Albany's allocation of a portion of the student activity fee to NYPIRG. The first interest is the promotion of a rich extracurricular life for students at SUNY Albany (App. 19A). The Regulation is consistent with a "common vision of the university as more than the sum of classes in its course catalog" (App. 20A).

The second interest is SUNY Albany's interest in NYPIRG's educational value to SUNY Albany students who choose to participate in NYPIRG (App. 20A). NYPIRG's educational value includes both its teaching of specific concrete skills and its transmitting a sense of civic duty to students (App. 20A-21A).

The third, and in the Court of Appeals' view, the most important, interest advanced by SUNY Albany in funding NYPIRG and other groups pursuant to the Regulation is to "stimulate uninhibited and vigorous discussion on matters of campus and public concern" (App. 21A). The Court of Appeals found that SUNY Albany's interest in "creat[ing] a forum for the expression of diverse views" is itself a concern of the First Amendment and that the funding scheme was part of the "university fulfilling its traditional mission in a free

society" (App. 21A-22A). These interests, especially when combined, are clearly substantial.[15]

The Court of Appeals then found that SUNY Albany's substantial interests would be less effectively achieved absent the Regulation (App. 23A-24A). The Court of Appeals found, for example, that "an alternative funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate" (App. 24A). Thus, the allocation of a portion of the student activity fee at SUNY Albany to NYPIRG is constitutional.

Further, the Court of Appeals faithfully applied the germaneness doctrine from the *Lehnert-Keller-Abood* line of cases to determine whether the petitioners could be charged for all of NYPIRG's expenditures (App. 24A). It determined that there was a sufficient nexus between the allocation of the fee to NYPIRG and SUNY Albany's educational interests, except to the extent that NYPIRG did not spend the allocation from SUNY Albany to benefit the students at SUNY Albany.[16] Thus, the Court of Appeals applied the germaneness test in a manner consistent with the prior decisions of this Court.

Finally, plaintiffs argue that the Court of Appeals decision is inconsistent with the Third Circuit's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) ("*Galda*"). However, the facts in *Galda* were entirely different. Most notably, New Jersey PIRG was

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15. Indeed, these interests would satisfy the compelling state interest standard, if it were applicable here. *See supra*, footnote 14.

16. Plaintiffs' attack on the Court of Appeals' method for ensuring germaneness is premature, since the precise procedure will be determined by the district court on remand (App. 25A-26A).

funded with a separate fee and not as part of the forum created by Rutgers' general student activity fee. In contrast, NYPIRG is funded out of the general student activity fee as part of the forum.[17] This distinction is critical as the Third Circuit explicitly declined to address the question which faced the Court of Appeals here -- "whether an organization with [New Jersey] PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views." *Galda*, 772 F.2d at 1064. In fact, the Third Circuit acknowledged, as the Second Circuit actually found here, that for groups funded by general activities fees, the university's role of presenting a variety of ideas might be a sufficient reason for some infringement of First Amendment rights. *Id.* at 1067. Thus, the factual differences between the two cases, which resulted in different outcomes, do not amount to a conflict in the circuits and do not provide a reason for this Court to grant a writ of certiorari.

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17. The plaintiffs try to blur the factual differences between *Galda* and this case by arguing that NYPIRG's funding is different from the funding of other student groups at SUNY Albany and, thus, more like the separate fee in *Galda*. This argument fails because NYPIRG's funding is not dissimilar to the funding of other student groups at SUNY Albany (*see*, *supra*, p. 5).

CONCLUSION

The allocation of a portion of the mandatory student activity fees to NYPIRG at SUNY Albany is constitutional because, as the Court of Appeals correctly found, the Regulation is content-neutral and the funding serves substantial state interests which would be achieved less effectively absent the Regulation. For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

June 15, 1992

Respectfully submitted,

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APPENDIX

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS W. CARROLL, et. al.,	:	
Plaintiffs,	:	OPINION AND ORDER
- against -	:	83 Civ. 1272 (RO)
DONALD M. BLINKEN, et. al.,	:	
Defendants.	:	

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OWEN, District Judge

This action was tried before me without a jury over six days in October and November 1989. Plaintiff, a student at the New York State University at Albany,[1] attacks as unconstitutional the allocation to the New York Public Interest Research Group ("NYPIRG"), of $3 from his $53 mandatory

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[1] After the trial was concluded, but before an opinion had been rendered, defendants moved to dismiss on the ground that the action had become moot because plaintiff Michael McChesney, who at the time of trial had been a student in good standing at SUNY Albany, had subsequently been academically dismissed. According to SUNY Albany policy, a student who has been dismissed for academic reasons can apply for reinstatement at any time. Although McChesney has not yet applied for readmission, he may choose to do so, and it is reasonable to expect that he would then again raise the same claim which was fully litigated in the trial before me. Thus, I find that this claim is "capable of repetition yet evading review," *Honig v. Doe*, 484 U.S. 305, 318 (1988); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), and is not moot.

In addition to McChesney, Thomas Carroll, Robert Carroll, Craig Rucker, Emanuel Panos, Beth Turkovic, Edward Priola and Robert Schmidlin, former students at SUNY Albany who graduated before trial, are also named as plaintiffs and seek damages. The trial was bifurcated and only the injunctive claims of McChesney were tried. Plaintiff now moves to add three new plaintiffs, Christine McClellan, Christopher Sandor and Susanne Zeigler, all of whom are currently undergraduates at SUNY Albany and all of whom seek to raise the same core issue raised by McChesney and tried by this Court. Because these parties assert a right to relief arising out of the same transaction or occurrence out of which McChesney sues and involve the same questions of law and fact, plaintiff's request is granted. Fed.R.Civ.P. 20.

The named SUNY defendants are Donald Blinken in his capacity as Chairman of the Board of Trustees of the State University of New York; the individual members of the SUNY Board of Trustees in their capacity as trustees; D. Bruce Johnstone in his capacity as Chancellor of SUNY; and Vincent O'Leary in his capacity as President of SUNY Albany. Certain of the original named defendants who were sued in their official capacities ceased to hold office during the pendency of this action and have been succeeded by the current incumbent trustees and administrative officers of SUNY, pursuant to Fed.R.Civ.P. 25(d).

student activity fee payable each semester.[2] The total $53 fee funds a great number of student activities which, having first met SUNY's criteria under regulations adopted pursuant to New York's Education Law § 355,[3] are then voted on by the Student Association and must thereafter be approved and certified by the President of the University. Under the foregoing, a wide array of student groups receive funding including sporting clubs, language clubs, the Black Alliance, the Revisionist Zionist Alternative, the Feminist Alliance, the Pan-Carribean Association, Fuerza Latina, the Gay and Lesbian Alliance, and the Student Association of the State University.

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2 If the students approve payment of the student activity fee on a mandatory basis, every student is required to pay the fee for each term he or she is registered; failure to pay the mandatory student activity fee may result in denial of registration, unless it is determined that payment of the fee may cause a particular student undue hardship. § 302.14(c). During the relevant period, the SUNY Albany undergraduate student body voted to collect the student activity fee on a mandatory basis.

3 The regulation, 8 N.Y.C.R.R. § 302.14, requires that the allocations benefit the campus community and are consistent with the following criteria:

(i) programs of cultural and educational enrichment;

(ii) recreational and social activities;

(iii) tutorial programs

(iv) athletic programs, both intramural and intercollegiate;

(v) student publications and other media;

(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature; ...

NYPIRG,[4] which receives the questioned $3, is a New York not-for-profit corporation in whose activities some nineteen New York State University campuses participate and from whose campuses its Board of Directors -- all students -- come by student election. NYPIRG provides an opportunity for students to gain experience in citizenship and advocacy skills through research and active participation in public policy issues. It endeavors to identify and evaluate issues involving public decisions in New York State, conducts research on such issues, makes recommendations for public action, provides representation before governmental agencies, and seeks to promote reform through legislative and legal action. NYPIRG does not endorse or support campaigns for elective office. It operates through local chapters on the campuses of those State Universities which participate. NYPIRG's Board of Directors and its officers are all students, elected from the campuses at which a local NYPIRG chapter is a student organization and receives activity fee funding. Any activity fee-paying student at such a campus is eligible to run for election to the NYPIRG Board of Directors. In recent years, one or more students from SUNY Albany have been elected and served on the NYPIRG Board. Some students, participating in NYPIRG's activities, earn academic credit for their work; others participate in the activities on a volunteer basis. In addition to those students actively involved in organizing these various NYPIRG programs, others serve the student body by promoting speeches, debates, public forums, film shows, a used-book exchange service, newspaper recycling centers, conservation tips, and consumer service handbooks. SUNY Albany has had students who participated in a small claims court assistance clinic through which the students assisted community residents in court. Students at SUNY Albany have conducted surveys on the drinking age, proposed tuition hikes, comparative prices

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[4]NYPIRG is unusual in one respect in that since it involves other campuses, it is specifically voted upon by the student body at large of SUNY Albany every four years. It has always been approved.

of various products at area supermarkets, services available to rape victims, local beverage stores' compliance with the bottle return law, and local drug stores' compliance with generic drug legislation. They have prepared and disseminated reports on local bank practices and services, and local taxicab overcharge problems. They formed a project to improve campus lighting and other safety features. Other NYPIRG projects on which students from SUNY Albany work include research on the impact of toxic waste dumping, along with efforts to identify and clean up local sites near the campuses; voter registration drives; research and advocacy efforts concerning food irradiation; and research and advocacy efforts directed at government accountability and ethics. Students have researched issues including the statute of limitations in toxic exposure cases, the state's policy regarding its holdings in banks or companies doing business in South Africa, the transportation of nuclear waste, the rising costs of local utilities, the shortage of high-quality child care, the pending reauthorization of federal higher education costs, higher education financial aid programs, and various proposals to raise SUNY tuition, and the escalation of the arms race, all of which issues became the subject of NYPIRG-sponsored speeches, public forums and/or public debates on the public SUNY campus.

Each of these projects is selected annually by the NYPIRG Board of Directors, which, as observed earlier, consists wholly of students from the many local chapters throughout the state. Continuing projects are subject to annual reauthorization. In addition, any fee-paying student at a campus may advocate a proposal for a new project and submit it to the student Board of Directors for approval at any time. Each year the NYPIRG board specifically reviews and adopts a legislative program for the up-coming legislative session. The local and statewide projects and activities approved by the NYPIRG board involve students in numerous research, advocacy and public service matters of concern at the Albany

campus. Participating students in each area learn about their chosen project; prepare reports, memoranda and press releases; practice public survey techniques; involve themselves in community service efforts; obtain experience in public speaking; sponsor debates; and communicate with their legislative representatives.

It is clear from the testimony at the trial, whether the witness was the college president or a NYPIRG board member, that this experiential opportunity is regarded as a substantial educational benefit to students at SUNY Albany, and indeed, such would appear to be self-evident. On each campus, NYPIRG employs a legislative director. The director's responsibility at SUNY Albany, for example, is to train students in speaking, writing, research, organization and advocacy skills as well as exploring and advocating new project areas. Instruction in these projects is not only supervised by the campus directors, but also by NYPIRG's executive director, its student Board of Directors and its executive committee. The project creativity staff overseeing this operation is located in two statewide support offices, one in New York City and one in Albany. These offices and the campuses have some 60 paid full-time non-student staff,[5] who receive approximately 54% of NYPIRG's annual budget of around $2.7 million. Approximately 30% of this money comes

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[5]NYPIRG's publication "Agenda for Citizen Involvement" states their purpose as follows:

> NYPIRG's professional staff works to shape public policy and develop citizenship skills in the areas of consumer protection, government and corporate accountability, and economic and social justice. Some 15 of these are registered lobbyists who, among other things, lobby state legislators and governmental officials sometimes in company with and sometimes not, but only on behalf of positions taken by NYPIRG's student Board of Directors. NYPIRG's Board of Directors annually fashions a "Legislative Program."

from student activity fees, 45% from door-to-door canvassing, 15% from commissions on NYPIRG's fuel buyers groups, and 10% from grants.

Through the student activity fee, SUNY Albany, as has been pointed out, funds a wide array of student groups and has created a diverse forum for public discussion and debate on issues that affect our country. College campuses should, can and do play a vital role in promoting such debate and training undergraduates to become concerned, involved public citizens. By allocating a portion of the student activity fee to NYPIRG, SUNY Albany creates an opportunity for those students who so choose,[6] to enhance their civic awareness and skills. Simultaneously, by allocating funds to other student organizations, SUNY Albany encourages those students who do not choose to join NYPIRG to develop other skills or engage in activities which focus on other issues. The SUNY Albany administrators have determined that NYPIRG provides substantial educational opportunities for students, consistent with the criteria laid out in the State regulations, and that conclusion is well supported by the record.

Plaintiff argues that NYPIRG is a political action group[7] with only an incidental educational component and that the decision by the SUNY Albany trustees and administrators to permit funding of NYPIRG from the mandatory student

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[6]At SUNY Albany alone, some 60 students are regularly active at all times and some have been involved as legislative interns and directors. As observed, SUNY-Albany is but one of nineteen participating universities in New York State.

[7] Plaintiff obviously disagrees with some of the positions taken by his fellow undergraduates, but he is at liberty to participate in the annual decision-making (see below) and urge positions he wishes to espouse for an upcoming year. Thus, NYPIRG should be viewed not for the positions it in fact takes but -- as the administration sees it -- for the opportunity it gives students to take positions and then gain experience in pressing for them.

activity fee is not primarily or genuinely an academic decision. Testimony at trial belies plaintiff's claim. The fact that some of NYPIRG's activities involve issues of public policy does not diminish its educational value. The educational value lies in the participatory civics training obtained by the students who take advantage of this opportunity. The SUNY Albany administrators, having determined that a valuable part of an undergraduate education is gained through direct "hands on" involvement in civic activities, that determination is entitled to deference. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 263 (1957). This determination is the type of academic decision that is best left to administrators and trustees with expertise in designing college and university curriculum and extra-curricular activities.

Moreover, the freedom of the University to determine its educational mission, consistent with the professional judgment of those who guide it, is itself an interest which the First Amendment protects, particularly when that determination fosters debate on public issues. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). College campuses play a central role in providing an open forum for debate. *See*, *Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981); *Healy v. James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'"). By funding over 100 diverse student organizations, SUNY has established such a forum.

In analyzing plaintiff's First Amendment claim, plaintiff's individual interest in wishing not to contribute a portion of his mandatory fee to NYPIRG must be balanced against the University's interest in providing all students with the opportunity to engage in a wide range of activities and creating a forum for discussion. In addition to plaintiff's

interests, one must consider the rights of the large number of students who voted for, participate in, and support NYPIRG, as well as the right of the student body as a whole to receive information through the exchange of ideas. Where the State spends money to expand public debate, and does so on a content neutral basis,[8] the Constitution does not provide those individuals contributing to State funds control over the allocation of their contribution. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1979). Plaintiff's payment of the student activity fee, just like taxpayers' contributions to the government's general funds, may permissibly be used to fund political action and speech, despite some individuals' opposition to the views espoused through such action. *See Buckley* at 92-93; *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).

In order to establish a First Amendment claim of compelled speech or association, plaintiff must demonstrate a close association between himself and the political speech with which he disagrees. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986). Absent a close identification, no First Amendment interest is implicated. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In *Barnette*, the Court struck down a school requirement compelling students to stand up and recite the pledge of allegiance. In *Wooley*, the Court found unconstitutional a state statute requiring an individual to publicly display a license plate motto that offended his religious beliefs. In *Pacific Gas & Electric*, the Court prohibited a requirement that the utility company

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[8] The University funds a wide range of organizations without considering what the groups' positions are on particular issues. NYPIRG, itself, exists to afford student the opportunity to take positions, whatever they may be. NYPIRG does not present students with fixed positions that the students must accept.

include political messages with which it disagreed in its billing envelopes. In each of these cases the objecting party was required to personally speak or carry a banner with which he disagreed. The connection between the objecting party and the objectionable speech was extremely close. In contrast, the SUNY Albany student who disagrees with a NYPIRG position is not himself compelled to speak out and voice NYPIRG's views, rather he is required only to contribute a fee to a general fund, out of which NYPIRG is but one group that is funded.[9] The connection between plaintiff and any one view or organization funded by the activity fee is attenuated. The fee supports over 100 diverse groups, and the contributions of the fee are paid by several thousand students. Thus, no close association exists between plaintiff and NYPIRG, and plaintiff's First Amendment rights are not infringed.[10]

In addition to the concern that an individual may be forced to utter an opinion with which he disagrees, compelled speech cases also raise the concern that an individual who wishes to remain silent may be forced to speak in order to counter a view with which he is unwillingly associated. For example, in *Pacific Gas & Electric*, the Court held that the obligation to include within its envelope a message with which the company disagreed constituted such a high degree of identification that the utility company might feel obliged to respond to the positions with which it disagreed in order to distance itself from those views. In contrast, because the activity fee is paid by thousands of students and supports over one hundred diverse groups, no risk arises that plaintiff will feel compelled to respond to the views of NYPIRG by

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[9] The fact that NYPIRG erroneously states in certain of its materials that it represents <u>all</u> students on its participating campuses, is not determinative on this issue.

[10] On plaintiff's theory, a student could unilaterally reduce his contribution to the student activity fund by a pro-rata deduction after determining all the organizations with whose goals he or she disagrees.

presenting counter viewpoints. If plaintiff is truly troubled he may obtain on demand a writing from NYPIRG making explicit his disassociation. Indeed, counter viewpoints are already present in the forum, espoused by those groups which do not share NYPIRG's positions. Plaintiff is free to remain silent and let others speak on the various sides of an issue or, alternatively, plaintiff may choose to join one of these other organizations. Yet another option available to plaintiff is to join NYPIRG himself and vote for it to take a stand on an issue which satisfies him.

This case is also distinguishable from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, including *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and the recent *Lechnert v. Ferris Faculty Association*, __ U.S. __ , 111 S.Ct. 1950, 59 USLW 4544 (1991), upon which plaintiff relies. These cases address compulsory payments to unions where the funds are used in part to support political speech or action with which the objectors disagree. In the *Abood* line of cases, the Supreme Court permits mandatory payments to unions so long as those payments go toward activities related to the collective bargaining process - even if objectors disagree with those activities. However, the Court disallows the use of mandatory fees to support activities that are unrelated to the union's collective bargaining functions. The union cases are distinguishable from the present case for two principal reasons. First, in the union context, fees are paid to only one source - the union - which claims to speak in behalf of all the employees; a dissenting employee has no other mouthpiece through which he may make his opinion heard. In contrast, as stated above, on the SUNY Albany campus, the activity fee funds a forum created for the purpose of fostering the expression of diverse views through a wide range of groups, and plaintiff is not directly associated with NYPIRG or any other single group with which he disagrees. Secondly, in the

union cases, dues may permissibly be used only to fund activities which form the core purpose of the union, namely collective bargaining. Here, the student activity fee is being used by SUNY Albany precisely to further the University's core educational purpose of maintaining a broad extracurricular program and an open forum for discussion and debate. *See Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983).

Plaintiffs also cite *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), in which the Third Circuit struck down Rutgers' separate mandatory fee used to support the New Jersey Public Interest Research Group (NJPIRG). However, in *Galda*, the Court limited its analysis, stating, "We are not concerned here with the question whether an organization with PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views." 772 F.2d at 1064. This, slender though it is, distinguishes that case from the one before me, and I feel more applicable here is Judge Adams' dissent, in which he states that "the justification for compelling student fees in a university setting is found in the First Amendment itself, which protects a university's right to educate, and students' rights to be educated by exposure to diverse ideological viewpoints." 772 F.2d at 1073 n.7. Plaintiff, arguing the "least intrusive means" position, contends that the same civic training could be obtained by a student from fora and community activities operating locally and separately on each of the campuses involved. But obviously, none of these efforts could be as effective if NYPIRG worked only as a single-campus organization rather than, as currently constituted, with branches on several different campuses. Further, the experience gained by the students could not possibly be as meaningful, if the students merely engaged in play-acting, rather than becoming involved in actual research and advocacy efforts on real issues of public concern.

Accordingly, for the reasons stated above, I find that SUNY Albany's funding of NYPIRG through the allocation to it of $3 from plaintiff's mandatory student activity fee does not impermissibly infringe upon plaintiff's First Amendment rights. Plaintiff's claim for injunctive relief is accordingly denied and the action is dismissed. The foregoing constitutes the Court's findings of fact and conclusions of law and is so ordered.

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In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.*, and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This reply to the briefs in opposition to the petition for a writ of certiorari is respectfully submitted because Petitioners believe strongly that the Respondents have mischaracterized the issues and have misstated the applicable law as established by decisions of this Court.

Petitioners will demonstrate that the Court of Appeals applied an incorrect legal standard and by so doing reached a conclusion seriously at odds with this Court's precedents. We will also show that the judgment and reasoning of the Court of Appeals is in conflict with that of the Court of Appeals for the Third Circuit.

This case involves claims by students at the State University of New York ("SUNY") that the payment of a portion of a **mandatory** student activity fee to the New York Public Interest Research Group, Inc. ("NYPIRG") amounts to coerced speech and coerced association, violating their constitutionally protected rights of speech and association because NYPIRG is an ideological organization which engages in political activity and political speech with which they do not agree and do not wish to be associated.

I

THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD AND IGNORED THIS COURT'S DECISIONS ON COMPULSORY FUNDING OF POLITICAL SPEECH

Respondents turn the issues presented by this case on their head by attempting to cover themselves with the banner of academic freedom. What this case involves, at root, is the opposite of academic and intellectual freedom: it involves the coerced financing by students of the political speech of an organization the Court of Appeals itself characterized as an "ideological organization" [App. 8A] which is engaged in political speech and quintessentially political activity [App. 14A], a group to which they do not belong, with which they disagree, and from which they derive no benefits.

Academic freedom is the freedom to inquire into subjects of one's choosing, to search for the truth, to embark on reasoning through a problem or question, to articulate an answer, to engage in scholarly debate, and to publish one's own proposed answer to the intellectual question. It does not apply to coerced subsidization of the scholarly speech of others. It certainly cannot be extended, without completely perverting its meaning, to forced funding of political speech and action of political groups such as NYPIRG. Such coerced support is antithetical to intellectual and academic freedom, for the issues taken up by NYPIRG are not intellectual but social and political, the proposed solutions involve political action, and there is no scholarly debate. Most important for the Petitioners, the issues are not chosen by them, their proposed solutions are not advocated by NYPIRG, and, indeed, NYPIRG's political speech and action is directed toward goals

that are antithetical to the interests of the student Petitioners[1].

Respondents also mischaracterize Petitioners' position and the issue in the case as the "garden-variety" objection to a student activity fee regulation [NYPIRG Brief at 8]. Even the Court of Appeals recognized that much more is involved than some students objecting to funding the cheerleader squad when it held that Petitioners' right to be free from compelled speech and compelled association "suffers" and "is compromised" when NYPIRG uses student funds "to raise issues on campus, organize the community and lobby the legislature in pursuit of [NYPIRG's vision of] 'economic and social justice.'" [App. 17A]

The crucial issue, then, is what standard is to be applied to determine whether the injury to the students' rights of free speech and free association caused by coerced funding of an ideological and political action group can be justified. The Court of Appeals held that the clear violations of fundamental First Amendment rights could be justified by "important" state interests, and that the mandatory fee was an acceptable means because "an alternative funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate." [App. 24A]

This two-part test is, Petitioners submit, completely at variance with the criteria established by this Court. We argued in our Petition that the only proper justification for so patent an injury to First Amendment rights is a "compelling" government interest. Respondents urge that this test has not been applied to forced funding cases and that it has been applied only with

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[1] Respondents' claim (NYPIRG Br. at 9, n 9) that acceptance of Petitioners' position would eliminate funding for all student groups is a classic red herring. Petitioners' claims arise because NYPIRG is engaged in political speech and action. No First Amendment rights are implicated by funding of the intramural or intercollegiate sports, the Glee Club, the debating team, the Math Society or the French Club.

respect to content-based restrictions on speech [NYPIRG Br. 12 and n. 14; SUNY[2] Br. 11].

The compelling state interest test is the test applied by this Court in coerced speech and association cases. In *Keller v. State Bar of California*, 496 U.S. 1, 9 (1990), this Court used the phrase "vital national interest" in describing the basis of the holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that strictly limited infringements on First Amendment rights inherent in the agency shop were justified. In *Lehnert v. Ferris Faculty Association*, 500 U.S. , 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), this Court characterized the justification in the labor union cases for requiring non-members to pay any dues or fees was the government's "vital policy interest" in labor peace and avoiding "free riders". In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-303 (1986), the Court referred to a "government interest in labor peace strong enough to support [a]...limited infringement on nonunion employees' constitutional rights," and cited with approval the test employed in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) that infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests...that cannot be achieved through means significantly less restrictive of associational freedoms" (emphasis supplied) [*Hudson* at 303, n. 11]. Additionally, two more recent "freedom of association" cases employ the "compelling state interest" test: *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) and *New York State Club Association v. City of New York*, 487 U.S. 1, 23 (1988). Finally, but certainly not least, in *Buckley v. Valeo*, 424 U.S. 1, 25, this Court held that in the political sphere the right of expressive association can be limited only by regulations which serve a compelling interest unrelated to the suppression of ideas.

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[2] We refer to the Brief of State Respondents as the "SUNY Br."

We respectfully submit that on the issue of "compelling" or "vital" state interest, this case is *a fortiori*, because the infringement of the free speech and association rights of the Petitioners is so patent and the political activity of NYPIRG is not a mere incident of its otherwise legislatively sanctioned role. The very fact that the Court of Appeals and Respondents appear confused on this point emphasizes the importance of this Court restating, perhaps more clearly than it has done in the union dues cases, the correct standard.

The Court of Appeals likewise erred in not requiring SUNY to use significantly less restrictive means to achieve the important government interests of encouraging extracurricular activities, giving students an opportunity to participate in "hands on" civics lessons, and fostering a forum of ideas. Even those cases Respondents cite for the proposition that something less than a "compelling" state interest will pass constitutional muster recognize that the imposition must be "narrowly tailored" or "least restrictive". Thus in *Abood*, although the Court held that collective bargaining was an important enough interest to justify some restrictions on dissenters' rights, it narrowly circumscribed the intrusion; thus in *Abood*, it held that union dues collected from non-members cannot be used to fund "political speech". And the Court, as it developed its union dues-dissenters' rights jurisprudence has narrowed the scope of the intrusion further. *See, e.g. Hudson* at 302 ("procedure must be carefully tailored"); *Lehnert* (chargeable activities "must not add to the burdening of free speech that is inherent in the allowance of an agency or union shop.") We have already alluded to the holdings of the "associational" rights cases, *e.g. Roberts* and *Buckley*, as to the limits on the permitted intrusion.

As we pointed out in the Petition, the SUNY student activity fee regulation itself provides the option of a voluntary fee. There is no logical or practical reason why the activity fee as a whole, or that part which funds political groups, cannot be voluntary. Moreover, as was pointed out in the Petition, there

are numerous opportunities for students to participate in civic and community organizations under the aegis of an established SUNY program for community work, none of whose more than 200 options except for NYPIRG is funded by the mandatory student activity fee. Finally, there is no reason in logic why a group which wishes to participate in the campus "forum" cannot do so with its own funds[3]. The notion of a forum of ideas as part of the academy, in keeping with principles of academic freedom, is completely inconsistent with coerced funding.

II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS

In its brief in opposition to the petition for writ of certiorari NYPIRG dismisses the conflict between the Second Circuit Court of Appeals decision in this case and the Third Circuit's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied* 475 U.S. 1065 (1986)("Galda II") by stating that "the facts in *Galda* were entirely different." [NYPIRG Br. 14] Even Judge Owen in his decision acknowledged that the distinction between *Galda* and *Carroll* was "slender." [Supp. App. 14D] We have already shown, in the Petition, why the Circuits are in conflict.

Moreover, there is a substantial and basic conflict between the two circuits with respect to the appropriate test or burden that the state has to overcome the students' First Amendment rights. The Third Circuit in *Galda II* applied the

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[3] Indeed, it is rather absurd for NYPIRG, which has a budget of more than $2.5 million, only about 30% of which is derived from student activity fees, to claim (NYPIRG Br. 10) that it will be excluded from the forum or silenced if it cannot rely on coerced financing.

"compelling state interest" test whereas the Second Circuit used a "substantial government interest" test. In its opinion in *Galda II* the Third Circuit applied the "compelling state interest" test; it made reference to that test no less than six times. In *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982)("*Galda I*") the Third Circuit Court of Appeals, in an opinion by Judge Adams (who later dissented in *Galda II*), also approvingly referred on six occasions to the "compelling state interest" test. In *Galda II*, in holding that the fee which the students at Rutgers had to pay to support NJPIRG violated their First Amendment rights, the Third Circuit concluded:

> "The University has thus failed to show any compelling state interest that would justify overriding the plaintiffs' First Amendment rights." (772 F.2d at 1068)(emphasis supplied)

The Second Circuit, on the other hand, as the respondents stress, did not apply the "compelling state interest" test but rather applied the "substantial state interest" test. Applying that test, the Second Circuit found that the state had met its burden, thereby overriding the First Amendment rights of the students and approving the collection of the fee, at least so long as it is used on campus. In applying a different test, the Third Circuit found that the state had not met its burden of overriding the First Amendment rights of the students and therefore held that the collection of the fee was unconstitutional.

The several conflicts between the Circuits cry out for clarification by this Court.

CONCLUSION

The issues raised in this case are of great importance. As was stated in the Petition, and reinforced by the *amicus* brief of Pacific Legal Foundation and several students at the University of California, the issue has far-reaching impact. The constitutional principles involved are profound. The confusion of at least one Court of Appeals is patent. The conflict between Circuits is apparent.

The petition for a writ of certiorari should be granted.

June 25, 1992

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